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URBAN HOUSING AND PLANNING

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CONTENTS

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FOREWORD

This symposium attempts to explore certain aspects of urban development and planning, particularly in connection with housing. No one would deny that our cities—especially the larger ones—are confronted today with problems, both old and new, which imperatively demand study and attention. Actually, in almost every state, there now exists in some form basic enabling legislation for the establishment of a planning board or commission on a community or even wider basis. Unfortunately, the exact scope of the powers, responsibilities, and purposes of these planning units is usually uncertain and confused. Some devote their energies to long range planning on a broad scale. Others formulate blueprints complete in every detail, apparently taking over the various functions of zoning, of laying out streets, parks, and public utilities, and of all other civic activities involved in housing and industrial development. To add to the confusion, in some regions these plans have far-reaching legal effects, binding both other public officials and also private landowners and developers, while elsewhere their recommendations have no legal status and are merely advisory. Some planning boards seem preoccupied with planning for, rather than with, the community, and apparently desire to impose one ultimate perfect plan in perpetuity on the city, while other planners conceive their function to be that of presenting to the community for its selection various alternative plans, all of which are subject to modification as future needs may dictate. It would seem that before we can hope to plan adequately for the future development of our cities, we must first determine what is the proper function and scope of these official city planners and in particular what legal and practical effects, if any, their plans shall have.

The enforcement of various urban controls on housing, industry, and civic services is all too often most unsatisfactory. In many areas, it is notorious that flagrant violations of building codes, zoning restrictions, minimum housing standards, and other city ordinances regulating the use and development of real property are widespread. The sanction of the criminal law here is usually ineffective; prison sentences obviously will rarely be imposed, and fines are frequently so trivial as to be ineffective. Moreover, over-worked public officials often lack the funds, personnel, and zeal to undertake a really effective enforcement campaign against such violators and

to maintain the constant, vigilant policing necessary. Private individuals may find their attempts to obtain enforcement costly, time-consuming, and sometimes frustrated by ancient legal rules. Obviously, what is needed here is some method of making law observance by the property owner so overwhelmingly necessary for his own personal advantage that, voluntarily or involuntarily, he will comply for his own self-interest. A possible solution along these lines may be to make such violations a defect in title, impairing marketability, barring new insurance and mortgages on the property, and having injurious consequences for existing insurance and mortgages. Unfortunately, apart from the legal problems which may be involved in such a solution, there is the critical practical difficulty that such a proposal necessitates what is almost always lacking today, namely, a simple, adequate method for the ascertainment of such violations and the disclosure by public records of them in title searching.

Another recent development in urban planning is the idea of the conservation of neighborhoods in our cities. We are now fairly familiar with the development of large scale planned communities built on vacant land and also with the eradication of slums and blighted areas in our cities, to be replaced by new and modern buildings. However, we have only begun to realize the possibilities and problems of a different approach, namely, the conservation of existing built-up, non-slum areas in our cities, which are still far too useful and valuable for complete destruction or eradication but yet which are so obsolete and deteriorated as to be plainly on the downgrade. If some method can be found to stop or slow down this deterioration, to conserve the existing and admitted values of the neighborhood from further decay—perhaps even to improve them—we may have the satisfaction of knowing that we have prevented the future advent in our cities of many slums.

ROBERT KRAMER.

THE MASTER PLAN: AN IMPERMANENT CONSTITUTION*

CHARLES M. HAAR†

General ideas are no proof of the strength, but rather of the insufficiency of the human intellect; for there are in nature no beings exactly alike, no things precisely identical, no rules indiscriminately and alike applicable to several objects at once. The chief merit of general ideas is that they enable the human mind to pass a rapid judgment on a great many objects at once; but, on the other hand, the notions they convey are never other than incomplete, and they always cause the mind to lose as much in accuracy as it gains in comprehensiveness.

II ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 13 (Bradley ed. 1946).

. . . The plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development; including, among other things, adequate provision for traffic, the promotion of safety from fire and other dangers, adequate provision for light and air, the promotion of the healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, and the adequate provision of public utilities and other public requirements.

U. S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT §7 (1928).

City planning in this country has witnessed a combination of professions and talents rare in any reform movement. From the outset sound legislation was recognized as essential for the development programs of the "new city." Great impetus was lent to erecting a legal framework for land planning by the United States Department of Commerce, which, through its Advisory Committees, promulgated and popularized standard enabling legislation for city planning and zoning.[1] Consequently, the theory of city planning[2] has had a decisive imprint in at least one area —state enabling legislation permitting municipalities to plan for and control the uses of land within their corporate areas.

Today enabling legislation for urban planning exists in all states but three.[3]

* I wish to acknowledge the assistance given by conversations with Professors Ayres Brinser, John M. Gaus, and Louis Wettmore, and by the collaboration of Emanuel L. Gordon, Esq., and of Ramond L. Posel, of the Harvard Law School Class of 1953.

† Assistant Professor of Law, Harvard Law School.

[1] U.S. DEPARTMENT OF COMMERCE, A STANDARD CITY ZONING ENABLING ACT (rev. ed. 1926) [hereinafter cited as STANDARD ZONING ACT]; U.S. DEPARTMENT OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (rev. ed. 1928) [hereinafter cited as STANDARD PLANNING ACT]. *Cf.* NATIONAL MUNICIPAL LEAGUE, MODEL CITY CHARTER (5th ed. 1941) (first planning provision, 1925).

[2] Since the planning movement is most developed on the municipal level, the phrase city planning is used throughout to indicate over-all physical planning. No functional distinction is intended to be made between the city and other governmental units or regions as respects the need for master planning.

[3] Florida, Mississippi, and Wyoming. There are others which are only thin sketches. For a digest of planning enabling legislation see HOUSING AND HOME FINANCE AGENCY, COMPARATIVE DIGEST OF THE PRINCIPAL PROVISIONS OF STATE PLANNING LAWS RELATING TO HOUSING, SLUM CLEARANCE AND URBAN REDEVELOPMENT (1952).

Within this legal matrix the master plan[4] concept is an established element. Since it has arrived at such status, one may assume that it is legislative policy to encourage, or enjoin, recognition of the master plan's significance in the process leading from planning to reality. But, as is the case with most statutes (plus the need for allowing wide discretion and experimentation in so novel a proposal as city planning), planning enabling laws are cast in broad, amorphous terms. Hence, the enabling acts indicate a general area of purpose which forms the basis for more detailed elaboration, initially by local legislatures and administrators, and finally by courts. To perform this task of elaboration it is necessary to grasp the motivations and uses of city planning. Accordingly, this paper is directed towards an examination of the function and nature of the master plan in order to appraise the appropriateness of the legal accommodation it has received.

I

THE CONCEPT OF THE MASTER PLAN

What is the master plan? This is one of those ultimates which any serious profession—especially in periods of crises—will ponder long and hard. It is racking the professional city planners. As such, it may be a valuable exercise for pedagogic purposes. Occasionally, a discussion framed in such terms may even lead to pertinent observations on the planning process. And it may contribute that advantage of defining any general term—a convenient short-hand to facilitate communication.

Under the strong conviction, however, that "master plan" has a variety of meanings, dependent both upon the context in which it is employed, and the purposes for which it is invoked, this paper attempts to view the problem solely as one of the uses of a plan. What precisely is the legislature shooting for by prescribing the writing of a plan? What are the "strategic points of decision making" sought to be influenced by the plan? Master plan may mean one thing when used to advise on the timing of construction of New York City schools, and quite another in the allocation of lands for recreational uses in a rural setting. Again, when utilized by

[4] This is the term most frequently employed. "Comprehensive plan," "general plan," "municipal plan," "city plan," "long range plan," or just plain "plan" are also used. But the differing nomenclature appears to have no functional significance. According to Bassett, the term master plan was first used in a report, RECENT NEW YORK LEGISLATION FOR THE PLANNING OF UNBUILT AREAS, REGIONAL PLAN OF NEW YORK AND ENVIRONS (1926). Its incorporation in the highly influential Standard Planning Act accounts for its presence in most enabling statutes. Heeding the message of Stuart Chase, planners have hotly decried the misdescriptive character of the term master plan; *e.g.*, Stanberry, *Is the Term Master Plan Obsolete?*, American Society of Planning Officials News Letter, June 15, 1949, p. 49, and following discussions elicited in *id.*, Aug. 15, 1949, p. 66, and Oct. 15, 1949, p. 84; Urban Land, Feb. 6, 1947, p. 1; N.Y.-PHILA. CHAPTER, AMERICAN INSTITUTE OF PLANNERS, EXCERPTS FROM PAKNIKAR THESIS 3 and *passim* (1954) (mimeographed). Essentially the objections have been that the term connotes (1) a single perfectly interrelated plan while in fact it is a series of plans, (2) a rigid design or blueprint rather than a flexible working guide, (3) "slavery and comprehensive authority," (4) a concern with purely physical arrangements and facilities thus leading planners to minimize basic social and economic purposes. "Development plan" (the term used in the British Town and Country Planning Act, 1947, 10 & 11 GEO. 6, c. 51) or "long range comprehensive plan" or "general community plan," the term used by the Housing and Home Finance Agency, are more favored terms. While it is easy enough to recognize a term of art, the relatively uncharted position of the planner may well justify this desire for a more accurate terminology.

a federal agency for ensuring that a locality is beginning a serious and coordinated attack on slums so that the granting of federal funds is warranted, its contents and scope must differ from the case of a court scrutinizing a zoning ordinance under attack as not consonant with the master plan. And, of course, whether viewed historically over time within one nation, or across-the-board between a country dominated by the institution of private property and one where nationalization of development rights—or of land itself—has become the accepted way of dealing with land-use problems, the master plan concept cannot be said to have a universal meaning. Nor is there any one way of formulating or administering it.

This is not to deny the necessity of paying close attention to the master plan concept in and of itself. Even though there are disagreements at the periphery, there is a core meaning that is fairly well agreed upon. Moreover, the empiric situation remains: the concept is constantly used. If its employment were confined to the planning profession alone, there would be small incentive to join in the fray, painful and so often fruitless are the awards of dictionary definition disputes. But the inescapable dilemma persists: the word "master plan" is used in enabling legislation, local ordinances, and judicial decisions. In the field of law this rather ethereal concept may have major practical importance: not only may the individual client's rights in his property be drastically affected; but—as is often the guise such issues take—constitutional questions dealing with fundamental relations between the state and the individual are at stake. Accordingly, with this switch in interest from the master plan as a technical exercise, the point of inquiry resolves itself into: what are the possible contributions of the master plan in formulating decisions concerning land use; what control should the plan exercise over the implementary regulations; to achieve this desired degree of relation between theory and practice, what criteria should be enumerated for the use of administrators, reviewing courts, and private developers?

With this orientation, the initial question is rephrased, so that it becomes: what, as envisioned by the enabling laws, are the uses of the master plan? Unfortunately the functions of the master plan are often beclouded in the enabling acts. There is also diversity of purpose in the acts of the different states. Still worse, there is often inconsistency of purpose even within the same statute. For these reasons, even a limited attempt at classification and precipitating out the various functions served by the master plan may be useful for purposes of clarification. While there is overlapping, it is believed each category underscores a sufficiently distinct consideration.

An approach to the master plan from the lawyer's perspective is necessarily dominated by the question of impact—what part does the plan play in men's affairs? An analysis of the planning enabling laws discloses a dichotomy in the ends sought to be achieved through a master plan: one part is largely didactic and deals with the virtues of planning; another—and quite distinct—portion moves away from speculation and is concerned with directing the application of human energies in land development. Recognition of this split may lead to understanding the difficul-

ties of making any practical application of the pure theory of the master plan. Again, it may help reshape the enabling acts to emphasize the processes by which the master plan manages to get itself realized.

The larger share of the typical enabling act concerns itself with the making of plans. The uses to society of this mechanism are envisioned as six broad types: (1) a source of information; (2) a program for correction; (3) an estimate of the future; (4) an indicator of goals; (5) a technique for coordination; and (6) a device for stimulating public interest and responsibility.

With respect to these values, the planning enabling laws are largely in the nature of an exhortation to the planners concerning theories and techniques of planning. As presently drafted, this part of the planning enabling acts constitutes a rudimentary text for the construction of a plan. It does limn the ethical and moral base of planning so as to make it an acceptable part of community institutions. To the professional planners, this part of the legislation may be of large significance; the proper contents and scope of the plan may cause much soul-searching and debate. It may also, in addition to setting up an internal ideal, serve the very practical purpose of strengthening the planning commission within the whole range of activities of local agencies competing for appropriations from the local budget. But so far as the other agencies of local government, the citizen of the city, the property owner and his lawyer, and the reviewing state courts are concerned, it is couched as a private dialogue between the state legislature and the local planning commissions.

A second set of functions allotted to the plan by most of the planning enabling laws deals with the plan's effects upon local legislative controls of land-use. It is this second broad group of uses of the plan which concerns the interest groups affected by planning. These uses seem to divide into five broad types: (1) a prophesy of public reaction; (2) a tool for the planning commission in making reports; (3) a guide to effectuating procedures and measures; (4) an ordinance regulating the use of land; and (5) a guard against the arbitrary.

This second major portion of the enabling act deals with the effectuation of the master plan: it concentrates on the impact, potential and actual, of the plan on the growth and decay of a city as these processes take shape—how the physical environment is modified by law. Only to the extent that the uses of the first type are incorporated into those of the second type, or influence the actual shape of their enactment, are they of any consequence in land-use activities. Only to this extent are planning theories and techniques given a role in the structure of local government.

II

WHAT THE MASTER PLAN MEANS TO THE PLANNER

The following are conceived to be the uses of the master plan relating primarily to the formulation of plans.

1. A Source of Information

The acknowledged initial step of the master plan procedure is what the British

Town and Country Planning Act designates as the "survey."[5] It furnishes a picture of the present state of conditions in the city. Most state statutes direct the planning commission, in the preparation of the plan, "to make careful and comprehensive surveys and studies of present conditions and probable future growth" of the community.[6] These include, we are advised by professional planners—although they are rarely specified in the enabling acts—studies of economic activity, population composition and growth, land uses, channels of movement, systems of public facilities, and physical resources and liabilities.[7]

Gathering and analysis of information is essential; it is the explanation and the buttress of the various conclusions embodied in the master plan. Further, the inventory process has value in itself. For even if the plan becomes a dust gatherer after it is set on its way,[8] this information can prove of use in injecting some light into the operations of such haphazard physical developments as do occur in the future. Thus, a formal attempt to abide by the master plan idea leaves at least this trace.

Of course, if it is to have meaning, the plan itself sets goals, embodies decisions; if it is to have practical effect, procedures must be established to see that these decisions have effect on land. The data itself is not necessarily part of the plan, but a necessary antecedent and, occasionally, a supporting reference. Thus, this category relates to the value of making a plan, and not properly to the plan itself. This thrusts back to a basic precept—planning as a process rather than a rigid blueprint, so that for purpose of analysis master-plan-in-progress would be a more accurate though cumbersome title.[9] An accounting analogy may be useful here: the master plan is the balance sheet of the planning process, a snapshot of conditions and goals as they exist at one particular moment in time; a new balance sheet must be drawn up periodically over time for the use of the analyst, at any given point of time, to sum up the changes in standards, ideas, and facts over the interval of time elapsed since the last balance sheet; the moving picture is momentarily forced out of the free flow

[5] 1947, 10 & 11 GEO. 6, c. 51, §5. For a comparison of the British and American techniques, see CHARLES M. HAAR, LAND PLANNING LAW IN A FREE SOCIETY 67-70 (1951).

[6] *E.g.*, PA. STAT. ANN. tit. 53, §9166 (1938); MASS. ANN. LAWS c. 41, §81C (1953 Supp.).

[7] LADISLAS SEGOE (WITH THE COLLABORATION OF WALTER H. BLUCHER, F. P. BEST, F. STUART CHAPIN, JR., AND OTHERS), LOCAL PLANNING ADMINISTRATION (Int'l City Managers' Ass'n, Chicago, 1941).

[8] The blame for this is sometimes laid at the door of roving planning consultants. The usually lay composition of the planning commission has dictated the wide use of consultant directed plans. See, *e.g.*, *The Consultant and the City Plan*, AMERICAN INSTITUTE OF PLANNERS, PROCEEDINGS AT JOINT CONFERENCE 6-10 (1950).

[9] There is no more clearly marked area of agreement among commentators than that the master plan is not a static blueprint, *e.g.*, SEGOE AND OTHERS, *op. cit. supra* note 7, at 29; EDWARD M. BASSETT, THE MASTER PLAN 61-64 (1938). Typical of prefatory statements to master plans is the following: "Thus, it should be added that these plans must be construed as a direction—a framework—for the guidance of the City's growth. New and unforeseen factors which affect this growth should be thoroughly analyzed in the light of these plans and again the 'best thoughts' applied. If it is recognized that cities are things in the process, then, any planning to be of value must be flexible to a degree and certainly continuing. In this respect, to amplify on a thought of John Dewey, it is not sufficient to achieve a planned City of Fairbanks, but far more . . . a planning City of Fairbanks." R. W. BECK AND ASSOCIATES, WOLF, 1 COMPREHENSIVE PLAN, FAIRBANKS, ALASKA (1954).

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of life and time into the static balance sheet or printed master plan for the sake of convenience of analysis and discussion. But the plan itself is basically a flexible point of departure.

2. A Program for Correction

By hypothesis the plan serves to indicate the area's sore spots and functional deficiencies. The enabling acts are necessarily couched in general welfare terms.[10] Hence, the stress on safety from fire and other dangers, provision for light and air, promotion of proper distribution of population, adequate supply of "public requirements." By asking the right questions, it helps answer the fundamental query, where do we begin? It probes for community needs not obvious at a given time. By comparing these sore spots in relation to their effects upon other aspects of the area's physical development and the magnitude of their repercussion upon the people, as well as inadequacies in the rendering of any municipal services to which people aspire, some priority of action can be recommended. In making determination of priority, of the city's "resources, possibilities and needs,"[11] the planners have stressed that financial ability and community predilections must be weighed.

3. An Estimate of the Future

The Standard Planning Act directs the planning commission to survey present conditions "and future growth" of the municipality, and directs that the plan shall be made with the general purpose of guiding a development of the municipality which will, "in accordance with present and future needs" best promote the community welfare.[12] In determining goals some attempt must be made to grapple with the changes of the morrow, for obviously, as the term "planning" readily implies, the planner should be concerned with emerging conditions. Thus, we are again advised by professional planners—and by some indefinite provisions in the acts—plans must be premised upon estimates of industrial growth, of the future age and group compositions of the population, and the other variables affecting the physical development of the community.

Thereby master planning puts a brake on the natural tendency to plan only for the immediate. It is the long-range point of view that is put forth as a unique contribution of the planning perspective. Alfred Bettman with characteristic cogent simplicity put it this way: "One of the personal difficulties of planners is that they itch to plan something they will live long enough to see, which is a bad itch from the point of view of good planning."[13] A mid-way view, perhaps, of this relation (although closer to the Bettman view than a first glance might warrant) is expressed by the California Planning Act's injunction that the master plan shall be "for a reasonable period of time next ensuing" after the adoption thereof as may practically

[10] The restatement of the judicial definition of the police power is almost universal.

[11] To use the words of the Massachusetts Enabling Act, MASS. ANN. LAWS c. 41, §81C (1953 Supp.).

[12] STANDARD PLANNING ACT, *op. cit. supra* note 1, §7.

[13] ALFRED BETTMAN, CITY AND REGIONAL PLANNING PAPERS (13 HARVARD CITY PLANNING STUDIES) 8 (1946).

be covered thereby.[14] Of course, only approximations of the city's future can be made. Consequently, to realize the full potentialities of the use of the plan, periodic modifications of the general plan should be required. This is outrightly recognized in the British legislation, which requires a five-yearly review of the development plan in the light of the then existing conditions.[15] The American acts more generally provide that the master plan may be amended "from time to time." Despite the inherent limitations on foreseeability, some awareness of prevailing direction will be attained; upon this basis anachronistic development can be curbed—that is, provided this potential use of the long-range view is allowed some play in the actualities of land development, and controls over such development.

4. An Indicator of Goals

The master plan should not merely incorporate ascertained or probable trends of development. Otherwise, only an incomplete job would ensue. Objectives should be set in terms of what kind of city the community wants. After the alternative courses of conduct have been presented, debated, and a selection made, the plan represents the decisions and judgments of a community concerning its desirable physical form and character. In this respect it is a blueprint of values—although once more its evolving nature must be emphasized. The plan can never be a total solution, for its exists over time, just as it is a statement of values at one moment in time. In providing this value scheme it brings to bear upon debate of current physical development long term considerations founded on basic assumptions. And while predicating goals, the problems that may impede their achievement, as well as the means for circumventing the obstacles, thrust themselves forward for analyses and solution. Hence, its educative force on the planners and the planned is again apparent—and its potentiality in the sphere of land development if these goals are allotted a role in the land-use field. Again, if the plan is backed by sanction, it itself becomes a factor in forcing the direction of the future.

5. A Technique for Coordination

The planning commission is conceived of by the planning enabling laws as an integrating agency. It is directed to study and crystallize the inter-relationships of the various land-uses and structures within the city. With different bodies concentrating on streets, parks, school sites, zoning, etc. (and with the increasing tendency to delegate new measures such as public housing or urban redevelopment to newly created authorities), there is a danger that each specific activity affecting the physical environment will lack coordination with the others, and that maladjustments, inefficiencies, and waste will ensue. It is the special task of city planning —comprehensive planning—to supply this coordination and mutual adjustment. The master plan is the instrument used to fulfill this function, in the words of the Pennsylvania statute, of "guiding and accomplishing a coordinated, adjusted, and

[14] CAL. GOV'T CODE §65271; see also §65201.
[15] Town and Country Planning Act, 1947, 10 & 11 GEO. 6, c. 51, §6.

harmonious development of the city and its environs. . . ."[16] The various land-uses and physical installations—the physical expression of the myriad of human activities in the city—are combined into a coordinated system. In so far as possible, each piece of property is to be in the right location for its particular use. This will guide the planning activities to achieve greatest efficiency of the whole.

By embodying information and standards concerning these inter-relationships, the plan can provide a pattern against which specific proposals for use or building may be viewed. As such, it "represents a recognition . . . of the fact that the value of each specific thing is determined only in relation to things outside itself, and that therefore one must have a guide to things outside in order to make intelligent decisions about the specific thing."[17] Through its use as a check-list, a more accurate realization of the consequences of any specific planning action may be acquired. And to the degree that the plan carries weight, a touchstone upon which to judge the merit of a proposed action is provided.

The coordination is not only horizontally with other activities affecting the physical environment, but also over time. It is the long-range point of view and the phasing of the program for reaching the ultimate objectives that emphasize the potential contribution of the master plan.

6. A Device for Stimulating Public Interest and Responsibility

What the previous categories of the values served by the master plan may very well add up to is simply this: the chief purpose of the master plan is that of mutual education. In the process of making a master plan, the planner may learn which issues are the relevant ones so far as the people are concerned, what terms are meaningful to them, and which alternatives make sense as they view them. This education of the planning board and staff is crucial for any plan to survive. Concomitantly, mustering public interest and participation in city planning is one of the most serious problems faced by the profession:[18] preparing the plan can be an effective channel of communication. It is generally understood that today full use must be made of the democratic process to achieve understanding and acceptance by the people who are affected by planning, and who must undertake the responsibility of enacting and maintaining it.

Whether the full implications of this view, and the two-way nature of the edu-

[16] PA. STAT. ANN. tit. 53, §9166 (1953); *cf.* OHIO REV. CODE §713.02 (1953) ("with a view to the systematic planning of the municipal corporation").

[17] Alfred Bettman, in AMERICAN SOCIETY OF PLANNING OFFICIALS, CONFERENCE ON PLANNING PROBLEMS AND ADMINISTRATION 60 (1940).

[18] See, *e.g.*, Pomeroy, *The Planning Process and Public Participation*, in AN APPROACH TO URBAN PLANNING 9-37 (Breese and Whiteman ed. 1953). Since the plan embodies basic goals and policies, an estimate of popular values is a primary necessity. A broad base of public participation is, therefore, to be encouraged.

The enabling acts contain oblique recognitions of this factor. A typical provision is that of Colorado: "The commission shall have power to promote public interest in and understanding of the plan and to that end may publish and distribute copies of the plan or any report and may employ such other means of publicity and education as it may determine." COLO. STAT. ANN. c. 163, §169 (1949). See also PA. STAT. ANN. tit. 53, §9168.

cative program, are grasped by the planning enabling laws is somewhat doubtful. Again, the intense concentration on the making of the plan rather than "doing something" with the plan, has weakened any salutary effects the state acts could have achieved. Most acts speak in terms of "making and adopting" *the* plan. The decision-making process as a presentation of alternatives to the citizens, with an evolution by debate and consideration of other alternatives, before a plan is chosen by community acceptance is not the activating assumption of the acts. While this is not precluded by the typical enabling law, its orientation is not towards that full public participation advocated by certain political scientists. Most enabling statutes do require the planning commission "to promote public interest in and understanding of the master plan." But it is primarily a case of the planning commission selling a plan it itself has conceived and formulated. True, many acts require public hearings prior to the adoption of the master plan;[19] but the positive potentialities are ignored.[20] Nevertheless, as occasionally used today by progressive planning commissions, even without express legislative authorization, the use of a series of plans has helped infuse life into the planning process.[21]

Evaluation: The Master Plan Is Hortatory

It should be evident from the foregoing uses of the master plan—if these were the sole values derived therefrom—that the statutory mandate to make and adopt a master plan is really synonymous with a mandate to plan. The master plan embodies recommendations for an area's development based on predictions of needs and resources for an estimated period of time. Comprehensiveness (a concern with the interaction of the elements of physical development), projection (a concern with the indicia of change), and policy (a commitment to desired goals) are its major premises.

Considered in this light, the generalized statutory emphasis of the master plan concept as it has thus far been limitedly articulated, is purely hortatory. So perceived, the property owner—and the lawyer in his professional capacity—can remain indifferent to this intellectual exercise of the planning profession. Hence, also, the difficulty of defining more precisely what the master plan is—for it becomes another way of asking what is physical planning.[22]

[19] *E.g.*, N.Y. CITY CHARTER §197b (adopted by referendum Nov. 3, 1936) (1943); MD. ANN. CODE GEN. LAWS art. 66B, §17 (1951).

[20] The master plan is usually open for public inspection, and may be distributed in summary form. The commission often has the duty to consult and advise with public officials and agencies, educational, professional, and other organizations, and individual citizens, concerning the carrying out of plans.

[21] The public relations of planning has of course always been precarious and has elicited varying stratagems. The charge that planning is collectivist regimentation probably caused the following kind of appeal: "Don't think for a minute that you can escape these problems by running away to a new location. . . . You will find that the areas you leave behind breed communism and socialism and increasing dependence on state and federal aid. The only solution is to attack and change these conditions through proper planning." PASSAIC-BERGEN COUNTY PLANNING ASS'N, LET'S FACE THE FACTS ABOUT THE PASSAIC-BERGEN COUNTY AREA 4 (undated pamphlet).

[22] "Master planning seems to me . . . to be absolutely essential for city planning. Indeed I am inclined to believe that on analysis the two will be found to be synonymous, or very nearly synonymous, terms. I am not talking about the application of planning in the current administration, but planning

III

WHAT THE MASTER PLAN MEANS TO PROPERTY INTERESTS

Planning law is directed towards (a) having a plan made; and (b) having it influence development. Given the requisite skill and energy, goal (a) may present little difficulty. The core-problem, however, rests in achieving goal (b): how to get the plan, a process of ideas, to touch and concern controls, the process of doing. Here is the area where the property owner's interest, and that of the lawyer he hires to represent it, comes into play; it is also the sphere of activity which concerns the other agencies of local and state government.

Thus far there have developed four primary ways in which local governments exert impact on physical development—public works, zoning, subdivision controls, and protection of mapped streets. To the city planner, the relation of the master plan to such regulatory ordinances is simple and clear. The plan is a long-term general guide for the development of the city; the regulatory laws are tools to bring the plan's goals into realization. Warnings have constantly emanated from the planners that the two must not be confused. "Instead of being itself the city plan, for which unfortunately it is often mistaken," says one of the early standard works in the field,[23] "zoning is but one of the devices for giving effect to it." To select another example, in an unpublished note to his model County Planning Enabling Act, Bettman wrote:[24]

> There has been some discussion as to whether the zoning plan is to be conceived of as a part of the master plan. But when the arguments are analyzed, there will be found to be some confusion as to the difference between the planning and the execution. The zoning ordinance is, of course, execution and the planning precedes it. . . . It may be that to some extent a land classification and utilization program, and a zoning plan are synonymous. But the mention of both is desirable so as to make perfectly clear that the zoning plan is a part of a precising of the plan for land classification and utilization.

In this translation into results in the physical form and character of the community, what are the advantages attributable to the existence of a master plan? More specifically, what has led to the theoretical desideratum of a two-step process —first the master plan, second the implementary legislation—which is to be found in planning literature and in most planning acts? And what is the bridge between them?

1. A Prophesy of Public Reaction

The first use that may be listed, viewing the master plan from the vantage of the

as a guide to be used in current administration on specific projects and specific problems." Bettman, *supra* note 17. That planners generally in effect recognize this synonymity, see the collection of remarks on the master plan in EXCERPTS FROM PAKNIKAR THESIS, N.Y.-PHILA. CHAPTER, AMERICAN INSTITUTE OF PLANNERS (1954) (mimeographed) in which one could substitute the word planning for that of master plan, wherever the latter term occurs, and be left with a series of generalized statements on the aims and methods of planning.

[23] SEGOE AND OTHERS, *op. cit. supra* note 7, at 44.

[24] Note 14 of Bettman's notes on *A Model County Planning Enabling Act*, in NATIONAL RESOURCES COMMITTEE ARCHIVES (Box 159).

impact it has on men's affairs, flows from the previous categories of Part II, especially number 6. At least one practical event of great importance emerges for the perspicacious developer of land. The master plan is at the very minimum an intelligent prophesy as to the probable reaction of the local governmental authorities to a given proposal for development. Notice is thereby served on parties (public as well as private, it should be noted) dealing in decisions affecting urban conditions as to the probable outcome of their proposals, where these are dependent upon planning approval, or even where the less direct but often more important sanction of needed public cooperation is involved. And, as is the case with the administering of many regulatory devices, more important in final tally than the impact of sanction is the educational influence of the regulatory program. In the light of the master plan, the private land owner may shape his own plans in the plastic stage when they have not yet crystallized; collision with the public interest can in some instances be deflected. Hence, the inclusion of the public interest in programs of land development may be effected without controversy.

2. A Tool for the Planning Commission in Making Reports

The previous category of prevision of the future on behalf of the private land developer merges into this one—a basis for internal coordination of government actions and programs. Public action—streets, schools, public buildings, housing—vitally affects community development. Yet different programs may vary widely in objective and timing. As the Housing and Home Finance Agency recently put it: "What is important is that there be a means whereby the program of any agency can be reviewed and adopted as may be desirable in relation to other programs in the community and in relation to one over-all plan."[25]

This potentially vital review function has been assigned to the planning commission. The usual procedure requires that before taking action necessitating expenditure of public funds, incidental to the location, character, or extent of a government building, the proposal shall be referred to the planning commission for review and recommendations. The effect of such recommendation varies widely among the states. In some instances it has no consequence; only the moral and publicity preventives are available. In others, an overriding vote by the local legislature is necessary. Sometimes this is a unique veto power, where more than a majority—as much as three-fourths—is required to override the commission's disapproval.[26] And,

[25] HOUSING AND HOME FINANCE AGENCY, SLUM CLEARANCE AND URBAN REDEVELOPMENT PROGRAM, THE GENERAL COMMUNITY PLAN: A PRELIMINARY STATEMENT 2 (1950). For the enthusiastic reaction of one planner, see Agle, *Housing and Urban Redevelopment,* in AN APPROACH TO URBAN PLANNING, *op. cit. supra* note 18, at 54-76.

[26] *E.g.,* PA. STAT. ANN. tit. 53, §9188 (1953); OHIO REV. CODE §713.12 (1953). *Cf.* ME. REV. STAT. c. 80, §87 (1953) (apparently a ⅘ vote is required for reversal). The provision for an extraordinary majority to overrule the commission is apparently unique in our governmental structure. Yet the planning commission in the exercise of this power is continually referred to merely as a recommendatory or advisory body. Gratton v. Conte, 364 Pa. 578, 73 A.2d 381 (1950) is interesting for the contention there made that even with this increased percentage, the commission could be overruled only when the council specifically found the recommendation to be wholly arbitrary.

in some instances, two steps are required: it must be overruled by the sponsoring municipal agency, and then by the local legislature.[27]

This coordination not only is between various governmental agencies, but may also be extended by the enabling act to include these activities and those of private developers. An example is the recent spate of legislation setting up public housing and urban redevelopment authorities. Nearly all of these require the new social welfare programs to accord with a master plan of land use for the community. Again, where referral of subdivision applications for a report by the commission is required before the plat may be filed, the master plan may influence the commission's decision.[28] In some instances, it is conclusive.

To Bassett, the author of the standard work on the master plan,[29] the use of the plan was strictly as a private guide for the planning commission. This is borne out by the Standard Planning Act, which makes no provision that the municipal legislature shall approve or adopt a master plan. Although not considering it quite as bad as legislative adoption, Bassett was dubious even of that Act's requirement that the plan must be adopted by the commission in whole or in part.[30] The fetish of plasticity and ease of change made him question even this relatively minor type of finalization. This attitude is flatly embodied in his Model Planning Law: "It [the master plan] shall be a public record, but its purposes and effect shall be solely to aid the planning board in the performance of its duties."[31]

The paradoxical conclusion emerging from the Bassett position is that it makes discussion of the legal aspects of the master plan superfluous.[32] In his Model Law, its existence is not a condition of referral to the commission. Indeed, the municipality has the option not to refer at all. Subdivision control is not dependent on the prior formulation of a plan, nor are any of the planning controls. The master plan becomes solely an engineering technique which the commission is encouraged to use.[33] As such, any effect the statutory direction to make a plan has, must operate

[27] N.J. STAT. ANN. §40: 55-1.13 (1953 Supp.).

[28] N.J. STAT. ANN. §40: 55-1.14 (1953 Supp.). Section 40: 55-1.20 provides that when the master plan for streets has been adopted the board may require that the streets shown on the plat conform in design and in work to the proposals shown on the master plan.

[29] THE MASTER PLAN (1938).

[30] "It ought to be a plastic plan kept within the confines of the commission." *Id.* at 67-68. "A master plan is nothing more than the easily changed instrumentality which will show a commission from day to day the progress it has made." *Id.* at 5.

[31] EDWARD M. BASSETT, FRANK B. WILLIAMS, ALFRED BETTMAN, AND ROBERT WHITTEN, MODEL LAWS FOR PLANNING CITIES, COUNTIES, AND STATES (7 HARVARD CITY PLANNING STUDIES) 40 (1935).

[32] See THE MASTER PLAN, *op. cit. supra* note 29, at 118, where Bassett strongly opposes the requirements of a ⅔ or ¾ vote by the local legislature to override the commission's recommendation. Contrast section 6 of his Model Planning Act with that of Bettman. See page 33 of MODEL LAWS FOR PLANNING CITIES, COUNTIES, AND STATES, *supra*. See also *id.* at 18 and 41.

[33] "The writer's view has been that a master plan should not be adopted by any official body except by a planning commission . . . . [otherwise] when the commission desires to alter certain features in it the legislative body must first be persuaded to authorize the change. This is certain to work disastrously because as soon as a plan ceases to be plastic it becomes a quasi-official map which has not been prepared and executed with the care and precision that the law requires in the case of official maps." THE MASTER PLAN, *op. cit. supra* note 29, at 61-62.

through the route of moral suasion. And, *a fortiori,* since the plan does not affect private conduct, there is no job for courts which the general guide can assist.

3. A Guide to Effectuating Procedures and Measures

The key-role of the master plan in the coordination of diverse activities affecting the city's land has been noted. This, too, is the role that it can provide for the whole series of legislative acts dealing with the whole series of such activities. The master plan can be most useful in establishing the framework within which to set the legal regulatory devices. Without such coordination, one regulatory device affecting one parcel of land, like zoning regulations, may undo the efforts of other controls over the same parcel, like subdivision regulations. Special regulation of tenement buildings may be rendered wholly ineffective by other laws taking a different approach to the control of the general environment.

Here there has been some confusion in the existing legislation. In the exercise of subdivision controls, the plan is sometimes made a guide for the regulations to be issued by the commission, the regulations having the direct contact upon the private land owner. The term "guide" is too weak in the case of zoning, where the zoning enabling statutes require that zoning regulations be made "in accordance with the master plan"; under other enabling acts, the master plan is supposed to erect the general policy framework within which to set the zoning regulation.

4. An Ordinance Regulating the Use of Land

The guide may become the ruler. Sometimes, enabling acts lend immediate binding effect to certain aspects of the master plan. The Pennsylvania Planning Act,[34] for example, makes the master plan itself the regulatory measure for the laying out of streets and parks. It is not a criterion by which to weigh implementary legislation; in itself it regulates and has direct impact on property rights.

It should be noted that this is contrary to the theory of the master plan—at least as understood by many planners. "It [master plan] is in no way legally binding upon private property," to select one example of this thought, "until or unless its recommendations are translated into official changes of the zoning map."[35] But in many spheres this binding effect is accorded the master plan by the enabling acts. Here, its function becomes the simple and familiar one of a government control on private activity. Consequently planning and enforcement may become undesirably confused.

5. A Guard Against the Arbitrary

A basic legal consequence of the master plan follows from its "comprehensiveness." This can be broken down into two aspects: by its requirement of information gathering and analysis, controls are based on facts, not haphazard surmises—hence their moral and consequent legal basis; by its comprehensiveness, diminished are the problems of discrimination, granting of special privileges, and the denial of

[34] PA. STAT. ANN. tit. 53, c. 48 (1953).
[35] AM. INST. OF ARCHITECTS, REPORT ON ZONING AND THE MASTER PLAN 9 (1944).

equal protection of the laws. Hence, the two most frequent sorts of attack upon government regulation become less available to the private landowner. If the local community has gone to the point of preparing a master plan, his chances of success in attacking an ordinance, based on the plan, are considerably diminished.

Evaluation: Diversity of Legal Impacts

Statutory directives characteristically are buttressed by sanctions. There arises therefore a presumption that master plan provisions are not mere exhortations. This is reinforced by the prominence, both in sequence and length, which these provisions occupy. But while the statutory references are cast in large and hopeful terms, they assign no clear legal position to the plan. The legal impact of planning is significant only as it imports governmental control of physical development; therefore, it follows that the master plan portions of planning law are legally significant only in relation to such control. And in the four broad areas—public works, zoning, subdivision, and streets—thus far traditionally assigned for impact by the master plan, no consistent pattern of interpretation of the effect of the plan on the real world has yet emerged in the legislation or judicial opinions. The whole gambit of possible effects of the plan on land-use controls is run. In some acts there is a tacit recognition that the official map, even though it must be submitted to the planning commission for its recommendation, need not comply with the master plan.[36] The requirement in the Zoning Enabling Act that the zoning ordinance shall be made "in accordance with a comprehensive plan" has apparently carried the courts no further than requiring that the ordinance be reasonable and impartial so as to satisfy the *constitutional* conditions for the exercise of a state's police power.[37] In others, the adoption of the master street plan is necessary before the planning commission can become the platting authority, but no further mention is made of tying the commission's activities to the plan.[38] And still others give the master plan itself the direct effect of a detailed land-use ordinance. Some acts do not even require the adoption of the master plan in order to exercise subdivision controls.[39]

[36] N.J. STAT. ANN. §40: 55-1.3 (1953 Supp.). The New Jersey act clearly distinguishes between the "master plan" and the "official map"; indeed, it takes the form of two separate acts. The Municipal Planning Act (§§40:55-1.1 to 40:55-1.29) deals with the master plan adopted by the planning commission; the Official Map and Building Permit Act (§§40:55-1.30 to 40:55-1.42) deals with the official map adopted by the local legislature. There is no close nexus between the two, however. True, if the relevant portion of the master plan has been adopted, the legislature must refer the proposed official map (or amendment thereof) to the planning board for its recommendation (§40:55-1.35). But no further statement is made in the act as to the consequences of disapproval by the commission because of conflict with the master plan.

[37] *E.g.*, Parsons v. Town of Weatherford, 135 Conn. 24, 60 A.2d 771 (1948); Kuehne v. East Hartford, 136 Conn. 452, 72 A.2d 474 (1950).

[38] *E.g.*, TENN. CODE ANN. §3407.10 (Michie Supp. 1943).

[39] *E.g.*, TEX. REV. CIV. STAT. ANN. art. 974a (1954). Washington, which has the famous duty to "inquire into the public use and public interest proposed to be served by the establishment" of the subdivision (WASH. REV. CODE §58.16.060 (1951)) nowhere mentions the applicability of the master plan in making such or other determinations.

IV

THE CRITERIA FOR A STATUTORY CHECK-LIST

An appraisal of existing planning legislation in the light of these two categories of potential uses of the master plan reveals striking inadequacies which require amendments. The importance of mutual education of the planner and the citizen needs to be stressed—right from the initial stage of survey where citizens' groups and associations, by the sheer process of gathering information, can learn of the adjustment of values. Secondly, the inevitably restrictive impact of the master plan —if it is to have any meaning—must be given effect by a general control, at crucial points, over implementary legislation regulating private use of land, as well as over land development by government agencies; here, the regulatory and planning aspects of the plan itself should be dissociated.

Why the master plan has not developed in the United States, and, more particularly, has never received full recognition from the courts, is subject to a simple explanation. The acts are vague as to what constitutes a master plan. Plans, even where adopted, are so indefinite as to what the city should be that they are incapable of measurable realization in the courts. The basic postulate of this paper, therefore, is that the planner's job is to rewrite the enabling acts so as to give them more concreteness. So far as possible the act should require the preparation of a minimum check-list for the people dealing with the plan—other city agencies, land developers, lawyers, and courts. Where the brush strokes are so broad that no one knows what they mean, city planners cannot register surprise when their own private interpretation does not become the accepted one. If the act can clearly state the type of policies and goals that should be covered by the plan, the master plan can be given substance, for any implementing legislation that does not accord with such statement would be *ultra vires* the enabling act.

The current formulation of the master plan, as directed by the typical enabling act, falls short of this desideratum. Usually, such acts content themselves with repeating the language of the Standard Act:[40]

> Such plan . . . shall show the commission's recommendations for the development of said territory, including, among other things, the general location, character, and extent of streets, viaducts, subways, bridges, waterways, water fronts, boulevards, parkways, playgrounds, squares, parks, aviation fields, and other public ways, grounds and open spaces, the general location of public buildings and other public property, and the general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power, and other purposes; also the removal, relocation, widening, narrowing, vacating, abandonment, change of use or extension of any of the foregoing ways, grounds, open spaces, buildings, property, utilities, or terminals; as well as a zoning plan for the control of the height, area, bulk, location, and use of buildings and premises. . . .

If the enabling law is to help the master plan play an important part in the

[40] STANDARD PLANNING ACT §6.

formulation and administration of government controls affecting land, it needs to be far more specific in its focus on objective and means than the above enumeration. And if the coordinative and the long-run perspectives of the plan are its unique contributions to making land-controls through the intervention of the state more scientific, the act should help clarify these roles. Thus, the makers of a plan should be directed to study and reach conclusions for presentation to the citizenry on certain underlying factors affecting a city's growth. This requirement should be mandatory. The findings and objectives to be covered by the plan should be full enough to guide the legislature in enacting ordinances which bite on property rights, and to give content to a judicial scrutiny as to whether the ordinance corresponds with the plan.

The stress, it is submitted, should be away from the physical and building aspects of development, and from, also, the public or municipal part of such development. Emphasis on the one factor reflects overconcern not only with the physical but also with the execution rather than the planning phase; stress on the latter factor flows from the view of the plan as a tool for the commission to be used primarily to check on land-use activities of other municipal departments, an inter-family arrangement, so to speak, rather than a use of the plan's criteria in the regulation of the private land developer. It does not seem too unfair a characterization of the enabling acts to say that the master plan in the past has really been thought of as a preliminary or sketchy zoning ordinance, street layout, etc.

Obviously it would be impertinent to attempt to list all such factors here, but a glimpse at the type of specifications can be attempted. The master plan should be required to state conclusions as to anticipated future population; anticipated employment opportunities; the goals for housing; transportation objectives; industrial, commercial, and residential needs; the over-all space requirements for each of these needs; and the relationship which shall exist between the spaces allotted for the different uses. The master plan should be asked to specify in general terms the amount and type of community facilities which shall be provided, and their interaction with the various land use areas; desirable standards of population density, of light, air, and open space; methods of transportation and communication and their inter-relation with the various land use areas. This is simply a starting suggestion as to the types of things the statutes should require the master plan to contain.

This sort of formulation, it should be noted, can give the assistance the court was seeking in the *Fairlawns* case.[41] The validity of the zoning ordinance turned, in the court's mind, upon its being "expressive of a plan which is comprehensive." This it defined as a relation "to the reasonable needs of the community, both at present and in the foreseeable future." And, with no further specifications as to what considerations of "reasonable needs" and the "foreseeable future" are, the court was compelled to strike out on its own.[42]

The zoning regulations in question are clearly expressive of a plan to maintain the pre-

[41] Fairlawns Cemetery Ass'n v. Zoning Comm'n of Bethel, 138 Conn. 434, 86 A.2d 74 (1952).
[42] 138 Conn. at 440, 86 A.2d at 77.

dominantly residential character of the town but still permit the less objectionable forms of business. The plan is not applied to a narrowly restricted area or for a limited time. In terms, the regulations cover nearly the whole town of Bethel and are in effect for an indefinite time. They leave some districts of the town open for uses other than business and residential. They therefore satisfy the requirement of the statute that such regulations be in accordance with a comprehensive plan.

This may or may not have been the proper planning tests to apply; but in the absence of other legislative guidance there is little room for complaint.

Ayres v. City Council of Los Angeles,[43] a notable decision, is a difficult one to understand against any theory of the master plan. It, too, perhaps indicates how amorphous phrasing may mislead the court. That case refused to compel the city council to approve a proposed subdivision. The city wished to impose conditions, mainly relating to dedication of land for highway widening. Petitioner urged that the planning commission could not act since a master plan had not yet been adopted by ordinance of the city council. The court rejected the relevance of this contention, stressing the great amount of time required to draw a complete plan. It also noted that the city charter provided for adoption of *portions* of the plan (though it is not indicated whether relevant geographical portions had been here adopted). The court concluded:

> . . . subdivision design and improvement obviously include conformance to neighborhood planning and zoning, and it may properly be said that the formulation and acceptance of the uniform conditions in the development of the district constitute the practical adoption of a master plan and zoning requirements therefor.

The dissent thought this an "amazing statement" because it permitted "practical adoption" to supplant the necessity of observing an apparently forthright statutory directive to enact a master plan. Planners *must* think it amazing because it completely ignores the purpose of requiring a plan, *viz.*, (a) as a check on the commission's competence to pass upon plats; (b) as a base for decision; and (c) as a base for review of that decision.

The court seems to attribute to the plan the sole function of achieving equal protection since it is by the following of what has been done in one part of an area that its "practically adopted" plan is made. The plan then is not a goal but a mirror of what has been done in the past!

In discharging this basic reason for the master plan's existence, the statute should require the publishing of supporting studies for these general assumptions and goals. This has the normal advantages of requiring administrative findings of fact. Not only is the body devising the plan thereby apprised of what it is to do, thereby obtaining a background of information necessary for sound regulation, but the studies will permit the community to analyze the alternative goals presented and to come

[43] 34 Cal.2d 31, 41-42, 207 P.2d 1, 7 (1949). Specifically, the court upheld the requirement that petitioner dedicate ten feet of land, and set aside an additional ten feet for shrubbery for a boulevard contiguous to his subdivision, but apparently independent of it. *Cf.* Newton v. American Society Co., 201 Ark. 493, 148 S.W.2d 311 (1941).

to an intelligent decision. Through the obtaining of data, and its analysis, an awareness of the need for planning (and that its alternative is limitation by course of events of freedom of alternative), and the responsibility it carries, does emerge in the electorate. Furthermore, property owners and the reviewing courts are helped in deciding whether the recommendations make sense or not.

This type of statutory guidance is also fruitful concerning the uses of a plan for the planner listed in Part II. No effort is made at a complete listing of the contents of a plan, nor a stratification as to methods of composition. What is attempted is an instruction to the commission as to the type of goals the citizens should decide about. These are largely generalized relationships of land-use over time which, if established by the master plan, can best carry out the plan's use as an aid for decision-makers.

In the constant struggle of choice between the over-general and the over-detailed, all kinds of gradations are possible. Not only have the present acts been far too generalized, but where they have touched earth, they have tended to be far too concrete. The plan should state the goals—the desirable maximum density of people per area; the question of how to arrange them should be left to the implementing regulation. The singling out by the present acts of *location* of uses seems mistaken. The use of the master plan in some areas of subdivision and street control as a vehicle of legislation should be discouraged. The need for isolating the regulatory from the planning function is overlooked. Unless the two are separated, the broad view will tend to be lost in the day-to-day handling of details. Different types of education and different kinds of people are needed in the different areas of planning and details. And, from the sheer mass of work, bearing in mind the limited resources of staff and time, energies will be devoted to the more immediate, usually more pressing task of the regulating of the land-use activities rather than to the broad, future aspects of such activities.

The stress in the enabling acts on the *location* of the various facilities also appears undesirable. It is the *relation* of airport sites to residential, industrial, and commercial areas that is the long-range planning function. It is not the function of a master plan to examine the territory and pinpoint in detail the sites and locations of the various activities; its job is that of goals and relationships. Blush as one may, it is primarily, as pointed out in Part II, a philosophic guide to a way of life; the pin-pointing of lots, unavoidably necessary in the transmission of planning ideas, is not the optimal use of the plan.

For this reason, the enabling acts should be amended to make clear that the master plan consists of statements of objectives and illustrative materials. The identification of the plan with maps is undesirable, for maps import location. Perhaps the term "diagrams" should be substituted.

Again, if the master plan is to include a zone plan—as is almost universally prescribed by the enabling acts—why not a subdivision plan, street plan, urban redevelopment plan, etc.? This inclusion of the zone plan was probably not thought

through. Rather, it is a reflection of the time and conditions surrounding the adoption of the Standard Planning Act when the zoning instrument was regarded not only as the pack-horse but also the only domesticated animal on the planning team. The logic of the Standard Act would lead to the absurd position of a subsuming of all a municipal government's functions to "city planning"—and under the aegis of the planning commission.

Lordship Park Association v. Board of Zoning Appeals[44] is a particularly interesting case for illustrating the serious problem raised if the plan is permitted to assume the function of an official map. The planning board denied approval of a proposed subdivision on the ground that it did not take into account the future construction of an extensive road along the Long Island Sound, a project contemplated in the master plan.[45] On appeal, the court reversed, ordering the town to approve the plaintiff's application. The court stated that the sole ground for disapproving the application was the adoption of the master plan, and the non-conformity with it of the proposed subdivision plat. This, it ruled, was an improper ground. For the master plan's provisions could not be consulted since

(a) the Council intended it to be only a "preliminary plan" not definitive of town policy;

(b) no regulations were ever adopted compelling compliance with the plan; and

(c) no public hearing had been held upon adoption of the plan.

Ground (a) is of course conclusive, if it can be determined that the town council did not intend the plan at all to influence the commission. The court here, however, shows ignorance of the nature of a master plan, at least as it has been propounded by the planning profession:[45a] "The vote of the town council at that time was not to adopt a definitive town plan. It was that the 'preliminary plan' be *adopted and used as a guide for future development subject to future changes*" (emphasis supplied). How else can a master plan operate? Is not the underscored part of the court's statement the traditional definition of the use of a master plan?

Ground (b) is not explained in the opinion and would seem to be another way of stating the court's objection that the plan was not intended by council to be a measure of decision, one that bites into the property rights of a landowner. The court itself must have felt some doubt as to the adequacy of its position for it went on to find a constitutional basis for holding the plan ineffective, a practice usually avoided where adequate non-constitutional grounds for decision are available.[46]

[44] 137 Conn. 84, 75 A.2d 379 (1950).

[45] The plan had been enacted by the Town Council pursuant to special legislation. This state act provided that the town council of Stratford should have "the power to provide a master plan or plans for the entire town or for any part thereof, which plan or plans may provide for the future layout and location of all highways . . . and, if such plan or plans be adopted, may prescribe by ordinance, rules and regulations, determining the manner in which such plan or plans shall be made, filed, recorded, changed, altered or amended . . . and may by rule and regulation compel compliance with such plan or plans." 137 Conn. at 88, 75 A.2d at 380-381.

[45a] 137 Conn. at 89-90, 75 A.2d at 381.

[46] In holding that a public hearing was constitutionally required the court cited no apposite authority.

The point of singular interest in the case is that it shows the master plan being used as a device to acquire the kind of restrictive option that legislation respecting the official map usually bestows. In order for the plan to serve this purpose it must partake of the characteristics of the official map. It is entirely possible to have such a "mixed" master plan (precise and definitive of decision in one respect, general and tentative in others), but—especially here where the plan is adopted by the local legislature—the union of function may lead to confusions.

Practically the most important reason for separating out the two functions is to prevent the allotting of the function of a zoning commission or of the formulation of subdivision regulations to the planning commission. This is, perhaps, the worst manifestation of the overloading detail which may warp the planning function. There is the important consideration, in addition, that the planning commission should be immunized, so far as possible, from the dissatisfactions and pressures where an individual owner is hurt by the land-use regulations.

This practical problem inspired the creation of the independent planning commission. To render it immune from the advances of interest groups, present enabling acts provide that the commission shall be composed primarily of private citizens of high standing in the community; their terms of office are staggered, usually made longer than the executive and the legislature. It is important to note that in those cities where it is the planning commission which is put in charge of drawing the zoning ordinance, or of making and enforcing subdivision regulations, this advantage of insulation does not even exist. For the commission can as effectively—or as ineffectively—ward off the interest groups seeking to change the zoning as it can attacks upon the master plan. If this be the premise of the enabling act, the argument for a two-step process of planning and regulating is weakened. It is true, on the other hand, that the composition of the commission may at least tend in the direction of supporting the zoning or other ordinance.

The basic premise of the master plan is that it is long-range: hence, proper planning of land uses will not be distorted by immediate pressures and short-range considerations. This is the recognized contribution of planning to the running of the ordinary affairs of local government. For example, the granting of a variance to run a grocery store may seem unimportant when focussing on the immediate neighborhood. But long-range planning may show that this will result in a flood of such demands, or be inconsistent with the desirable allocation of land uses for commercial purposes in the entire municipality, or hinder the proposed future evolution of the area into a fine residential one. The expressed aim is to make the master plan play a greater part in men's affairs through its control of executory legislation. The relevant inquiry in formulating a planning enabling act then becomes: if the master plan is to have too definite effect upon zoning or subdivision controls, as would

While most enabling acts require such a hearing upon adoption of a master plan it has never been suggested that a constitutional requirement is present. For comment on this aspect of the decision, see Note, 49 MICH. L. REV. 909 (1950).

follow from invalidating any implementary legislation in conflict with its provisions, will not those same pressures that are said to distort the implementary controls be brought to bear on the master plan? In fact, the end-result may be worse, for the long-range plan may be distorted in the process. Keeping the plan out of vexatious details may reduce the imminence of this threat.

But planning, in an important sense, cannot afford to withstand "pressures"; if it is to have a chance of success, it must attempt to accommodate them. One crucial function of the master plan is to obtain a basis of consent. The act should require the preparation by the experts of a series of alternative plans, on which hearings are held, with the legislature selecting one. Only by continued discussions of alternative courses of action (not in the sense of a legal hearing in which a definite proposal is submitted for argument) can the objectives be formulated, and the goals stated in a way which makes sense to the people. Planning is a leading to understanding and the possibility of community acceptance of the master plan, not, as it has often tended to be, a holier-than-thou attitude with respect to *the* plan. The idea of experts who prepare *the* plan is a static one. Those who are affected by the plan must participate in its making and in carrying it out. And as it changes, as it must, to cope with new conditions and to introduce new concepts, the different interest groups must be won over, or reconciled.

Overloading of detail may also impair public acceptance. This is critical where the plan is regarded as a statement of goals, isolated and illuminated by experts, but selected by the representatives of the community. Once the master plan is limited to findings, principles, and relations, and is prevented from containing detail, it will be more understandable and arouse greater interest. Proposals concerning mass transportation as opposed to the use of private automobiles, or the separation of industries from residences are exciting issues which can command the attention of the voter. The technical details of whether a setback should be ten or twenty feet, or the differences between floor area ratios and other bulk controls are not subjects which can stimulate such debate, nor receive definition and redefinition by the ordinary public. The plan will help achieve the goal of stimulating the people, focussing their interest on planning, and induce them to undertake the responsibility of enacting the planning measures necessary to achieve these goals. Bearing this proposal in mind, a broad statement as to how much daylight shall be provided in each room—not the details of a zoning plan which require much spelling out in scientific terms of angles of elevation—is the proper concern of the master plan. The comprehensive scope of the master plan gives it great imaginative appeal, and is therefore a peculiarly appropriate way of stimulating public interest in the whole city. Indeed, this is an overwhelming reason for the two-step process. The plan should be adopted and amended only after public hearings by the planning commission with further public hearings by the legislature.[47]

[47] The New Jersey courts in a series of cases involving actions by municipalities to set aside or enjoin conveyances of lots for failure to obtain plat approval, mentioned as ground for the denial of relief that

V

THE WRITTEN MASTER PLAN

The master plan is an ever changing recordation of the city planner's *end-result thinking,* embodied in a series of diagrams, charts, standards, and policies. Theoretically there is no need for the recordation of these results. The fact that a planning jurisdiction has no deliberately produced "master plan" in progress does not conclusively indicate its absence. Given an individual who (1) is engaged in city planning and (2) has the capacity to retain mentally all the ingredients that make up that process, there would be no need for that body of materials called the master plan. The improbability of such a mnemonic freak[48] indicates, however, that the failure to engage in the task of producing a tangible master plan shows a failure to engage in city planning. In short, the need for the master plan manifests nothing more than the need for city planning itself.

Nor is it a self-proving proposition that the existence of a master plan affects the constitutional validity of specific land-use controls. The injury alleged in each case of land-use regulation must be pitted against the measure's relation to the health, safety, morals, and welfare of the community.[49] Production of facts and arguments to substantiate the relation would not seem to be dependent upon evidence of a master plan: facts and arguments do or do not have strength independent of their embodiment in a tangible plan. It might very well be that the validity of a land-use control would depend upon whether a particular design of development was being pursued; but the existence of such a design can be argued without pro-

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it had either not been alleged or proved that a master plan had been previously adopted by the planning board. City of Rahway v. Raritan Homes, 21 N.J. Super. 541, 91 A.2d 409 (1952); Borough of Oakland v. Roth, 25 N.J. Super. 32, 95 A.2d 422 (1953); City of Newark v. Padula, 26 N.J. Super. 251, 97 A.2d 735 (1953). In all of these cases, however, it was similarly either not alleged or proved that a planning board had been created by the local governing body. Conclusive weight cannot therefore be attached to the language respecting the plan. The subdivision statute (N.J. STAT. ANN. §40:55-12), however, as regards the master plan was the same as that involved in the *Ayres* case, *supra* note 43. There the court seemed to read the statute as requiring the prior formulation of the master plan.

Fred G. Stickel speaking before a Bergen and Passaic Counties Planning Seminar (reproduced in 62 REGIONAL PLAN ASS'N BULL. 4 (1952)) argued, prior to these cases, that regardless of any specific section of the statute, when read as a whole "you cannot help but see that all actions and powers of the board are based on the premise that its first function and duty, *i.e.,* the preparation and adoption of a master plan, has been done. . . . I realize full well that many boards are exercising their functions without having prepared and adopted some sort of master plan, and they are getting away with it. Why, therefore, should I demur? Because if I am right, and the courts agree with me, planning will receive a definite setback at a very inopportune time."

The newly enacted New Jersey planning statutes effective January 1, 1954 (N.J. STAT. ANN. §40:55-1.1-40:55-1.1.42) remove any doubt and make clear that there is no such requirement. In this respect the new Act follows its evident design throughout to reduce the power of the commission and thereby the status of the plan.

[48] Formal embodiment is essential to lend it requisite status, as concerns public relations, and to impress its existence and significance on the lawmaker. Most important, however, is that there be in existence definite evidence of the substantive elements of the plan.

[49] The classic statement in the zoning field is, of course, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). A nearly exhaustive list of zoning cases is contained in 117 A.L.R. 1117-1148 (1938).

ducing a tangible master plan.[50] (Indeed, the latter is no assurance that the design will be followed for, according to orthodox planning theory, the master plan gives no legal status to its constituent recommendations.) But the fact nevertheless remains that zoning and subdivision litigation gives rise to questions with respect to which courts might well feel the lack of touchstone of decision lends considerable psychological sway to guiding policies which are presented in tangible form. Courts inevitably do lend weight to expertise. True, the same effect can be achieved (as, say, in the proposed New York City Zoning Regulation) by a direct expression in the zoning ordinance of the policy reasons for the insertion of the various provisions, and of how the whole has been shaped to achieve a more efficient and attractive city. Yet the existence of a master plan (assuming the measure in issue conforms thereto) indicates in a more satisfactory fashion that this expertise has really been put to work on the particular problem before the court. Thus the deference it commands is more likely to be brought into play.[51] In this oblique manner the master plan principle may affect planning litigation. Hence, the value of making a master plan both as a basis for winning community consent to any proposed regulations, as well as enhancing the chances for judicial approval of a particular regulation. Hence, also, its importance for the property owner.

This may be the major significance of the master plan today in terms of impact on the property owner, as listed before in Part III. If the plan is regarded not as the vest-pocket tool of the planning commission, but as a broad statement to be adopted by the most representative municipal body—the local legislature—then the plan becomes a law through such adoption. A unique type of law, it should be noted, in that it purports to bind future legislatures when they enact implementary materials. So far as impact is concerned, the law purports to control the enactment of other laws (the so-called implementary legislation) solely. It thus has the cardinal characteristic of a constitution. But unlike that legal form it is subject to amendatory procedures not significantly different from the course followed in enacting ordinary legislation. To enact a nonconforming measure amounts merely to passing the law twice.

At the present stage of development, however, it is on so slender a reed that the touchstone values of the master plan must hang. This may prove disappointing to planners. As Mr. Justice Holmes pointed out,[51a] "there is in all men a demand for the superlative." The yearning for an absolute principle, and a master plan that truly answers all questions is understandable.

Yet this seems the limited function to which the master plan can withdraw in order to perform most effectively in the grand effort to improve American cities: a reminder of the myriad of activities affecting land, their inter-relation, their long-run

[50] This may be what the majority was driving at in Ayres v. City Council of Los Angeles, *supra* note 43.

[51] See, *e.g.*, Berkfield Realty Co. v. City of Orange, 12 N.J. Super. 192, 79 A.2d 326 (1951).

[51a] Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

effects which the day-to-day administrator is too busy to consider. The implementing legislation, on pain of being outside the statute, must conform to its generalized propositions. True, to remove any conflict, the local legislature need but repass the master plan, changed so as to permit the regulation presently desired. But the need of the formal step of amending the plan insures to some degree that the expert's long-range and coordinative contributions are given play in the real world. It may also be desirable—along the lines of the greater than majority vote required by some statutes if the local legislature desires to reverse the planning commission's recommendation concerning a proposed municipal construction—to require that for this purpose the legislature can amend the plan only by a two-thirds or three-quarters vote. This will highlight the master plan's primary role as a constitution. It is a point of view which should be introduced in a courtroom when a particular measure is being assayed.

Existing planning enabling legislation is in large measure based on assumptions of the role of the master plan which have not been clarified, nor established by experience; not enough thought has been given in the planning profession to the crucial phase of planning implementation in the planning process; the proper contents of the plan, as determined by the needs of the particular decision-makers for which it is to serve as a guide, have not been analyzed; on the local government level, indifference is the general reaction to the master plan, largely attributable, it is suggested, to its failure to develop as an authoritative, legally enforceable device. No detailed plan should be adopted except as authorized by and pursuant to the master plan. From the perspective of the lawyer and his client,[52] it is the ultimate impact of the plan on property that determines the vital uses of the master plan, and, therefore, its proper contents. To the degree that machinery is not created for implementing the master plan in the existing world of real property development, society is denied the very real values of the planning process.

Only recently have theory and practice begun to converge in the administration of cities. The search for certainty has warped the function of the master plan; similarly, and paradoxically, the polar principle of flexibility has obviated its usefulness as a standard. An analogy to the field of law is not inappropriate. To the layman, there are clear rules of law that speedily resolve disputes and give ready answers; to the layman, too, the master plan can, with precision, solve all future land-use problems. To the professional, in both instances, life is far more complicated and in too much a state of flux to be handled in so slide-rule a fashion. The lawyer, of all people, should be sympathetic to the planner as he grapples with this heavenly kingdom of the master plan.

[52] The famous "bad man" suggested by Mr. Justice Holmes as the focus for understanding the meaning of law? See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

APPENDIX: STATE PLANNING ENABLING ACTS

As yet, litigation over the master plan has been scarce. An understanding of the legal accommodation given that concept is therefore derivable primarily from the controlling statutes. The approach of this Appendix is to analyze and reassemble the various sections of the state planning enabling acts so as to highlight the significance, if any, of the master plan's impact on property rights.

Charts cannot give a complete and precise picture of the statutes involved, partially because the statutes themselves are not precise. The purpose of these charts* is not to convey substantial analysis of the laws of any one state, but rather to aid in gaining an "over-all" view, through the device of comparison, of what at this date the master plan means in the United States.

Chart I deals with the composition of the planning commission, its place in politics, and its relation to the legislature. The relation of the commission, usually charged with formulating the master plan, to the other agencies of local government is of obvious importance to the private land developer.

Chart II deals with the preparation of the master plan—who is primarily responsible for its preparation, adoption, and amendment.

Chart III analyzes the contents of the plan—with the varying emphases on the plan as a map, and the shadings from architectural to economic and social planning.

Chart IV, of the greatest interest to the lawyer, analyzes the enabling acts in terms of how they translate plans into action.

Chart V deals with the legal impact of the master plan on the other agencies of government.

* The following abbreviations are used in the charts:
P/C—planning commission;
M/P—master plan;
SPA—Standard Planning Enabling Act;
Z/C—zoning commission;
N/P—no provision.

TABLE I
THE PLANNING COMMISSION

State	No. on P/C	Ex officio members	By whom appointed	By whom approved	Compensation	Term of office	Removable by whom; what grounds	Qualifications
Standard Planning Act	9	Mayor, administrative official chosen by mayor, and member of council chosen by council	Mayor, if he is elected; if not, by officer designated by council	N/P	None	Six years for appointed members, staggered each year; ex officio members, for term of own office	Mayor, for inefficiency, neglect, or malfeasance, councilman removable only by council, on same grounds	Appointed members may hold no other municipal office, except that one may be on zoning board of appeals
Alabama	9	Same as SPA	Same as SPA	N/P	None	Same as SPA	Same as SPA	Same as SPA
Arizona (County)	9	County assessor, engineer, and attorney serve in an advisory capacity	County Board of Supervisors	N/P	None except reasonable travel expenses	Four years, staggered each year by supervisorial district	County Board, for cause	Qualified electors, residents, and real property owners; 3 from each supervisorial district; not more than one of the 3 from any incorporated municipality
Arkansas	At least 9	N/P	City council	N/P	None	N/P	N/P	At least 2/3 hold no other office
California (Amended stat. shown below dash line)	5–9 ——— 5, 7, 9	N/P ——— City officers; not more than 1 on P/C of 5, 2 on P/C of 7, 3 on P/C of 9	Mayor	Leg.	Up to $10 per meeting, limited to $50 per mo., plus travel expenses ——— Any amt. set by leg.	Four years, staggered roughly each year ——— Ex officio for official tenure	Mayor, at his pleasure, with approval of leg.; or by majority vote of leg.	A majority must not be officials of the city
Colorado	5–7 (no limit on home-rule municipalities)	If 5 members, then mayor & member of council are 2 of the 5; if 7 or more, then mayor, administrative official selected by mayor, and member of council, selected by council	Same as SPA	N/P	None except reasonable traveling expenses to city planning conferences, meetings of planning institutes, etc.	Six years, staggered so that 1/3 of P/C turns over every two years	Same as SPA	Bona fide residence in municipality for duration of membership; appointed members may hold no other office, except that 1 may be on zoning board of appeals
Connecticut	5	Chief exec. officer, and city engineer or comm'r. of pub. works	N/P	N/P	N/P	As fixed in ordinance; not more than 1/3 of terms to expire in any one year	N/P	Electors holding no salaried municipal office
Delaware	5–9	N/P	Mayor (if no mayor then by	City council if	N/P	3–5 years, staggered yearly	Mayor for cause, after hearing, &	N/P

TABLE I—CONTINUED

State	No. on P/C	Ex officio members	By whom appointed	By whom approved	Compensation	Term of office	Removable by whom; what grounds	Qualifications
			town commissioners)	mayor appoints			with approval of city council; if no mayor, then by commissioners	
Florida[1]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Georgia (Gen'l Stat.)	3–7	N/P	Leg.	N/P	Reimbursement for actual expenses	Up to four years	Leg., after hearing, for cause or on written charges	Any citizen of municipality, except member of leg.
(Spec. Stat.)[2]	14	See under Qualifications	Some by mayor, some by Commissioners of Revenue & Roads	N/P	Actual expenses incurred	Three years, staggered	N/P	Citizenship requirements giving representation to each county; include mayors of municipalities in area, & chairmen of Bd. of Commissioners of Roads & Revenues
Idaho	6–12	Up to 1/3 of the members may hold other office	Mayor	Council	None	Ex officio: term of office; appointive: 6 years, staggered every 2 years	Leg., after hearing, by majority vote	Not more than 1/3 may hold other office; all must be resident taxpayers, except one, who may be non-resident taxpayer; appointments should be without respect to political affiliation
Illinois	N/P	Mayor & pres. of bd. of local improvements	N/P	N/P	N/P	N/P	N/P	N/P
Indiana	9 or 10	Member of council chosen by council, member of bd. of pk. commissioners chosen by commissioners, member or representative of bd. of pub. wks., city engineer, and in 1st class cities, county surveyor	Mayor appoints other five	N/P	None, except expenses, including per diem allowances to citizen members for attending mtgs., not to exceed $5/mtg. or $10/mo./member	4 years, staggered yearly for citizen members; others coextensive with terms of office unless replaced	ex officio can be replaced by another from same bd. at 1st regular meeting of year	Of five appointees, not more than 3 of same political party; appointees must be citizens citizen members must: 1) have knowledge and experience in matters pertaining to development of city, 2) hold no other office in the city gov't., 3) be residents of the city
	7 in cities without certain depts.	3 from city govt.	Common council appoints 3 from city govt., mayor appoints 4					"citizens" and not over 2 of same party for mayor's appointees (& other requirements)

TABLE I—CONTINUED

State	No. on P/C	Ex officio members	By whom appointed	By whom approved	Compensation	Term of office	Removable by whom; what grounds	Qualifications
Iowa	At least 7	N/P	Mayor	Council	Actual expenses, which are subject to approval of Council	5 years; not more than 1/3 to expire in any 1 year	N/P	Citizens of municipality qualified by knowledge or experience; no elective office-holders
Kansas	7–15	N/P	Mayor	Council, or bd. of commissioners	None	3 years staggered yearly	N/P	2 residents of surrounding area of city covered (3 mi.) by act; the rest residents of city
Kentucky[3]	7	Mayor, adm. official selected by mayor, and member of leg. chosen by leg.	Mayor	N/P	None	6 years, staggered yearly	Mayor (leg. for member of leg.) Same as SPA	Same as SPA
Louisiana	5–9	N/P	Mayor	N/P	None, except travelling expenses may be paid to & from planning conferences, etc.	Equal to membership, number staggered yearly	Mayor, for inefficiency, neglect of duty, or malfeasance in office, after hearing	Hold no other office
Maine	5	N/P	N/P	N/P	N/P	5 years, staggered yearly	N/P	Can't be salaried official of the municipality
Maryland	5	1 member of the council	Mayor	Council	None	5 years, staggered yearly	Council for inefficiency, neglect of duty or malfeasance in office	N/P
Massachusetts	5–9	N/P	Mayor	Leg.	N/P	5 years, staggered yearly	Mayor, with approval of leg., for cause	N/P
Michigan	9	Same as SPA	Same as SPA	Council	None, except reas. travelling expenses to planning institute meetings, etc.	3 years, staggered yearly	Mayor, after hearing, for cause	Representative of businesses and professions; no other office; one may be on zoning board
Minnesota[4]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P other than resident citizens
Mississippi[1]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Missouri[5] (1st Class Counties)	10	Member of leg. chosen by leg., county highway engineer, and chairman of 2 municipal plan-	6 residents appointed by leg.	N/P	None, except expenses allowed not to exceed $10/mtg. at	Ex officio—term of office, but not to exceed 4 years	N/P	6 residents must be residents of unincorp. area of county

TABLE I—CONTINUED

State	No. on P/C	Ex officio members	By whom appointed	By whom approved	Compensation	Term of office	Removable by whom; what grounds	Qualifications
		ning bodies in county			2 mtg./mo.			
Montana (County)	5	3 county commissioners, county surveyor, and county assessor	N/P	N/P	None, but reimbursement for expenses	N/P	N/P	Residents of county
Nebraska	9	N/P	Mayor	3/4 vote of council	None	3 years, staggered yearly	By mayor, with consent of 3/4 of council, for inefficiency, neglect of duty, malfeasance in office, or other good and sufficient cause, after hearing	Shall represent in so far as possible different professions or occupations; shall hold no other municipal office
Nevada	9	Chief engineer, or surveyor or deputy, and 2 other officials one of whom may be member of governing body	Mayor	Leg.	None, expenses allowed	6 years, staggered yearly	Maj. vote of leg. body for neglect, malfeasance, or inefficiency	Same as SPA
New Hampshire	9[8]	Same as SPA	Same as SPA	N/P	None	6 years, staggered[9]	Same as SPA	Same as SPA, except may be members of budget committee in a town or a justice of the municipal ct.
New Jersey	5–9	Mayor, city official to be appointed by mayor, member of leg., appointed by leg. (city official only if 7 or more members)	Mayor; mayor may also appoint a citizen's advisory committee, to serve at his pleasure	N/P	None	Term of official tenure for ex officio, for members, same no. of years as are members on bd., staggered yearly	Appointing officer, for cause, after hearing	No other municipal office, except that 1 may be on zoning bd. of appeals & 1 on bd. of education; no member may act on any matter in which he has direct or indirect personal interest
New Mexico	Not less than 5	Adm. officials of city may be appointed ex officio	Mayor	Leg.	N/P	2 years, staggered yearly	Mayor, with confirmation by council, for cause, after hearing	N/P
New York	5 or 7	N/P	Mayor	N/P	N/P	Term of office-holders ends with term of mayor; others, 3	Mayor, after hearing, for cause	Not more than a minority can hold other public office

TABLE I—CONTINUED

State	No. on P/C	Ex officio members	By whom appointed	By whom approved	Compensation	Term of office	Removable by whom; what grounds	Qualifications
						year terms, staggered each year by one-third		
North Carolina	3–5	N/P	Governing body	N/P	Leg. may provide	N/P	N/P	N/P
North Dakota	8	Executive officer, engineer of munic., and atty. of munic.	Executive officer	Governing body	None, but may have travelling expenses to planning conferences	5 years, staggered yearly	N/P	N/P
Ohio	7	Mayor, service director, and pres. of bd. of park commissioners	Mayor	N/P	None	6 years each, except that terms of 2 members of 1st com. shall be for 3 years	N/P	Citizens of city
	5 if commission gov't	Chairman of commission	Commission	N/P	None	6 years, except of 1st commission (staggered)		
	5 if city manager	Chairman of council; city commissioner	City manager	N/P	None	6 years, staggered		
	5 in village	Mayor, one council member chosen by council	Mayor	N/P	None	6 years, staggered		
Oklahoma (Cities over 160,000)	9	N/P	Mayor; if election to council is by wards, must be at least 2 from each ward	N/P	None	6 years, staggered yearly	Same as SPA, after hearing	Same as SPA; if election to council is by wards, then at least 2 from each ward
(All Cities)	not less than 5	N/P	Mayor	Leg.	None	3 years, staggered yearly	N/P	Citizens residing in municipality
Oregon	10	Mayor, city atty., and city engineer	Mayor	N/P	None	4 years, staggered yearly	N/P	Not more than 2 of the appointed number shall be non-residents
Pennsylvania[7] (1st Class)	N/P	N/P	Mayor	N/P	N/P	N/P	N/P	N/P
(2nd Class A)	9	N/P	Mayor	N/P	None	6 years, staggered 1/3 every 2 years	N/P	No more than 2 may be paid employees of city
(2nd Class)	9	N/P	Mayor	Coun-	None, ex-	6 years,	N/P	Residence in county;

TABLE I—CONTINUED

State	No. on P/C	Ex officio members	By whom appointed	By whom approved	Compensation	Term of office	Removable by whom; what grounds	Qualifications
				cil	cept expenses to planning conferences	staggered 1/3 every 2 years		no more than 2 may be paid city employees
(3rd Class)	5	N/P	Council	N/P	None	5 years, staggered yearly	N/P	Residence within zone of jur. of P/C; mayor and councilmen ineligible
Rhode Island[8]	N/P	N/P	Mayor; in towns, elected at annual mtg.	Council	N/P	N/P	N/P	
South Carolina (Cities over 34,000)	9	Mayor, city engineer, pres. bd. of pk. com., member of council chosen by it, and county supervisor when laying out streets beyond corp. limits	Mayor	N/P	None	4 years	Mayor, after hearing, for: inefficiency, neglect of duty, or malfeasance in office	Same as SPA
South Dakota	Not less than 5	Adm. officials may be appointed ex officio	Mayor	Council	N/P	2 years, staggered yearly	Mayor, with confirmation by council, for cause	N/P
Tennessee	5–10 (no. designated by legis. body)	Chief exec. officer of city, and member of legis. body chosen by legis. body	Chief exec. officer	N/P	None, unless P/C acts as zoning. Bd. of Appeals, then compensation set by leg. but as zoning Bd. of Appeals	To be provided by leg., must be arranged so that one term expires each year	N/P	N/P
Texas[4]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Utah		To be provided by leg.			None, except expenses	To be provided by leg.		
Vermont	5	Mayor, or ch. of bd. of selectmen or ch. of bd. of village trustees	Mayor (cities) bd. of selectmen (tns.) village trustees (vill.)	N/P	N/P	4 years, staggered yearly	N/P	N/P
Virginia	5–7	One may be member of council; 1-3 may be adm. officers appointed by mayor	Mayor	N/P	None	4-6 years, to be provided in ord.; term of official tenure for ex officio members	Provision to be made in ord. for removal on basis of: inefficiency, neglect of duty, or malfeasance in office	Ex officio members must be in minority; same as SPA, plus must be qualified voters of municipality

TABLE I—CONTINUED

State	No. on P/C	Ex officio members	By whom appointed	By whom approved	Compensation	Term of office	Removable by whom; what grounds	Qualifications
Washington	3–12	To be provided by ord; not to exceed 1/3 of P/C	Mayor or commissioner of pub. works	Council or city commissioners	None	6 years, staggered so that fewest possible terms expire in any one year	By appointing official with approval of council or board, after hearing, for: inefficiency, neglect of duty, or malfeasance in office	N/P
West Virginia	Not less than 5	N/P	Mayor	Leg.	None	3 years, staggered yearly	N/P	Taxpayers and residents
Wisconsin	7	Mayor, city eng., pres. of pk. Bd., an alderman; if no city eng. or pk. bd.; mayor makes that many more appointments, but these offices for 1 year; city, by ord., may increase number so that bldg. commissioner or bldg. inspector may be member	Mayor; Alderman to be elected by 2/3 vote of council each April	N/P	N/P	3 years, staggered yearly	N/P	Citizens of recognized experience and qualifications
Wyoming[1]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P

[1] No planning enabling act.
[2] Special statute establishes metropolitan planning commission for Fulton and DeKalb counties.
[3] Kentucky has 3 statutes: one for 1st class cities (Louisville), providing for joint planning commission with county; one for 2nd class cities (there are 7 of these) making planning commission mandatory; one for other cities. Except as otherwise noted, these notes refer to the last (most general) law. In 2nd class cities, 5 city members are on the planning commission, 2 county members. Of the 5 city, 2 are ex officio, others have 4 year terms staggered biannually.
[4] No planning enabling act, but many references in zoning and platting statutes to planning commission.
[5] Class 2 counties have substantially same power, but only for public recreation purposes; there is a county planning and recreation commission, but no formal master plan. First class cities same as class 2 counties.
[6] There are different numbers in towns and villages—5 or 7, with but 1 ex officio; shorter terms, when fewer on planning board.
[7] Township and borough acts are not considered here.
[8] Rhode Island has a special comprehensive statute for Newport, and also for state planning.

TABLE II

PREPARATION OF THE MASTER PLAN

State	Who Prepares	Who Adopts	By what vote	Hearing	Action by Local Legislature	Filing	Who Amends	How	Adoption in Whole or Part	Criteria for Partial Plan
Standard Planning Act	P/C	P/C	Affirmative vote of 6	Yes	N/P	Certified to council & county recorder	P/C	Same as adoption	Either	Geographical or functional
Alabama	P/C	P/C	Same as SPA	Yes	N/P	Same as SPA	P/C	Same as adoption	Either	Same as SPA
Arizona (County)	P/C	P/C & County Bd. of Supervisors	Majority	Yes	Submission to County Board for consideration and action, at least one hearing; Bd may alter any part of plan; must refer alterations to P/C, but may disregard its recommendations	N/P	P/C & County Board	Same as adoption	Either	Functional divisions of the subject matter, when by P/C; N/P when by County Board
Arkansas	P/C	P/C	N/P	Yes	N/P	Certified to council; filed with city clerk & with county recorder	Council may amend or abolish	N/P	Either	N/P
California	P/C	P/C adopts M/P, which is certified to leg., in whole or part, for adoption as "official plan"	2/3 of P/C; vote of Leg.	Yes	P/C certifies to leg. for vote to adopt M/P, or any part, as official plan	Certified to leg. for vote to adopt	P/C & Leg; Leg. may not modify M/P in adopting it, without first submitting the proposed modification to P/C for a report; Leg. may make any change in M/P after adoption, but must first	Same as adoption	Either	N/P

TABLE II—CONTINUED

State	Who Prepares	Who Adopts	By what vote	Hearing	Action by Local Legislature	Filing	Who Amends	How	Adoption in Whole or Part	Criteria for Partial Plan
							refer to P/C for report; P/C may also initiate proceedings for amendment			
Colorado	P/C	P/C	2/3 of membership	Yes	Leg. must approve before M/P can be filed or recorded	Certified to leg. for approval, & then filed with county clerk & recorder	P/C	Same as adoption	Either	Geographical or functional
Connecticut	P/C	P/C	Majority	Yes	Plan effective at date set by P/C	Filing with town clerk	P/C	Same as adoption	Either	Geographical or functional
Delaware	P/C	Leg. adopts "official plan"; P/C adopts development plan	Development Plan maj. vote; official map N/P	N/P	Leg. must adopt "official plan"	Official plan filed with recorder of deeds	Leg.—official plan (by 2/3 vote if P/C not in accord) P/C - development plan	Maj. vote	N/P	N/P
Florida[1]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Georgia (Gen'l. Stat.)	P/C	N/P	N/P	N/P	P/C makes recommendations to leg. for its determination	N/P	N/P	N/P	N/P	N/P
(Spec. Stat.)[2]	P/C	P/C	8 votes	Yes	M/P is recommendation to leg. for its determination	N/P	Leg., after referral to P/C for advice	N/P	Either	Geographical or functional
Idaho	P/C	Council	N/P	N/P	P/C only suggests coordinated plans to council	N/P	N/P	N/P	N/P	N/P

TABLE II—CONTINUED

State	Who Prepares	Who Adopts	By what vote	Hearing	Action by Local Legislature	Filing	Who Amends	How	Adoption in Whole or Part	Criteria for Partial Plan
Illinois	P/C	Council	N/P	N/P	Council must adopt	N/P	Council	P/C recommends	Either	Geographical or functional
Indiana	P/C	P/C	Majority	Yes	Leg. must adopt M/P as ordinance; if no action in 60 days, then M/P has effect of ordinance; if leg. amends or rejects, goes back to P/C; if P/C approves, then ordinance stands as passed; if P/C disapproves, then action by leg. of no effect unless re-passed by 75% vote (P/C has 45 days to act)	Certified to city council	Leg.	Same as adoption	N/P, but implication by part	N/P
Iowa	P/C	P/C & Council	2/3 P/C	Yes	Council must approve	Certified to council for approval	Council	3/4 vote if P/C disapproves change	Either	N/P
Kansas[3]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Kentucky	P/C	P/C	5 votes (out of 7)	Yes	N/P	Certified to leg. body & county clerk	P/C	Same as adoption	Either	Geographical or functional
Louisiana	P/C	P/C	N/P	Yes	N/P	Filed with local leg. body & clerk of parish court	P/C	Same as adoption	Either	Geographical or functional
Maine	P/C	P/C	Majority	Yes	N/P	N/P	P/C	Same as adoption	N/P	N/P

TABLE II—CONTINUED

State	Who Prepares	Who Adopts	By what vote	Hearing	Action by Local Legislature	Filing	Who Amends	How	Adoption in Whole or Part	Criteria for Partial Plan
Maryland	P/C	P/C	at least 3 votes	Yes	N/P	certified to council & county recorder	P/C	Same as adoption	Either	Geographical or functional
Massachusetts	P/C	P/C	Majority	N/P	Official map is adopted by leg.	Official map is filed with clerk	P/C amends plan "from time to time"; map amended by leg., with hearing, upon recommendation of P/C; can vary P/C recommendation only by 2/3 vote	See previous column	N/P	N/P
Michigan	P/C	P/C	At least 6 votes	Yes	N/P	Certified to council & county register	P/C	Same as adoption	Either	Geographical or functional
Minnesota[4]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Mississippi[1]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Missouri (1st Class Counties)	P/C	P/C	Majority	Yes	N/P	Certified to county clerk and recorder of deeds	P/C	Same as adoption	Either	N/P
Montana[5] (County)	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Nebraska[3]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Nevada	P/C	P/C & Leg.	N/P	By Leg. & by P/C	Leg. must adopt, but can't amend P/C recomm. without allowing P/C to report	Certified to regional P/C, county P/C, & bd of co. com.	N/P	N/P	Either	Geographical or functional
New Hampshire	P/C	P/C	Majority	N/P	N/P	Certified to council	P/C	Same as adoption	Either	Geographical or functional

TABLE II—CONTINUED

State	Who Prepares	Who Adopts	By what vote	Hearing	Action by Local Legislature	Filing	Who Amends	How	Adoption in Whole or Part	Criteria for Partial Plan
New Jersey	P/C	P/C	N/P	Yes	N/P, except that redevelopment must conform to M/P as approved by leg.	N/P	P/C	N/P	Either	N/P
New Mexico	P/C	P/C	Majority	Yes	N/P	Certified to municipal council	P/C	Same as adoption	Either	Geographical or functional
New York	P/C	P/C	N/P	Optional	N/P	Filed in P/C office, with city engineer, & with city clerk	P/C. Leg. may amend official maps re streets, parks, etc.	Same as adoption	N/P	N/P
North Carolina[3]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
North Dakota	P/C	P/C & Leg.	4 votes	Yes	Leg. must adopt; must have 2/3 vote to adopt where changes not recommended by P/C	Certified to leg.	Leg.	Same as adoption	Either (in adoption by P/C); N/P (in adoption by leg.)	Geographical or functional
Ohio[6]	P/C	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Oklahoma (Cities over 160,000) (All Cities)[7]	P/C	P/C	Majority	Yes	N/P	Certified to council	P/C	Same as adoption	Either	Geographical or functional
Oregon[7]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Pennsylvania (1st Class)[8]	P/C	Leg.	N/P	N/P	Leg. adopts as it chooses	N/P	P/C recommends amendments to leg.	N/P	N/P, but implication by part	N/P

TABLE II—CONTINUED

State	Who Prepares	Who Adopts	By what vote	Hearing	Action by Local Legislature	Filing	Who Amends	How	Adoption in Whole or Part	Criteria for Partial Plan
(2nd Class A)	P/C	Leg.	N/P	N/P	Leg. adopts as it chooses	N/P	P/C recommends amendments to leg.	N/P	N/P, but implication by part	N/P
(2nd Class)	P/C	P/C	N/P	N/P	N/P	N/P	P/C	N/P	Either	Either
(3rd Class)	P/C	Leg.	N/P	N/P	Same as 1st Class	N/P	P/C recommends amendments to leg.	N/P	N/P	N/P
Rhode Island[9]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
South Carolina (Cities over 34,000)	P/C	P/C	Majority	Yes	N/P	Certified to council & all leg. & adm. agencies affected	P/C	Same as adoption	Either	Geographical, or functional
South Dakota	P/C	P/C	Majority	Yes	N/P	Certified to council	P/C	Same as adoption	Either	Functional
Tennessee	P/C	P/C	Majority of all members	N/P	N/P	Certified to leg.	P/C	Same as adoption	Either	Functional subdivision of subject matter
Texas[10]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Utah	P/C	P/C & Leg.	N/P	N/P	Leg. must adopt	Certified to Leg.	N/P	N/P	N/P	N/P
Vermont	P/C	P/C & voters	N/P	N/P	Approval by voters	N/P	Same as adoption		N/P	N/P
Virginia	P/C	P/C	Majority	Yes	N/P	Certified to council & clerk of ct. where deeds recorded	P/C	Same as adoption	Either	Geographical, topographical, or functional

TABLE II—CONTINUED

State	Who Prepares	Who Adopts	By what vote	Hearing	Action by Local Legislature	Filing	Who Amends	How	Adoption in Whole or Part	Criteria for Partial Plan
Washington	P/C	Leg.	N/P	Yes	Leg. adopts upon recommendation by P/C	Certified to munic. clerk filed with county auditor	Leg. with concurrence or upon recommendation of P/C	N/P	Either	Geographical or political subdivisions; or functional subdivisions of subject matter
West Virginia[11]	P/C	Leg.	N/P	N/P	Submitted to leg. for consideration & action	N/P	N/P	N/P	Either	N/P
Wisconsin	P/C	P/C	Majority	N/P	N/P	Certified to council	P/C	Same as adoption	Either	Functional
Wyoming[1]	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P

[1] No planning enabling act.
[2] Special statute establishes planning commission for Fulton and DeKalb counties.
[3] No formal provision for master plan.
[4] No formal provision for master plan; yet city authorized to carry on "city planning activities."
[5] No formal provision for master plan; planning commission makes and adopts "development pattern" for a planning and zoning district; for details see Chart IV.
[6] These plans are not formal, i.e., no formal approval, no formal hearing, no set form, etc. They are divided into 2 categories: (1) zoning recommendations, and (2) recommendations for public developments, utilities, streets, etc.
[7] No formal provision for master plan; planning commission may make plans and recommendations to city and others.
[8] Cities of 1st class and 2nd-A and 3rd class have no express power to adopt a general plan.
[9] Planning board to report annually to council, recommending plans and schemes of development, giving cost estimates.
[10] No enabling statute for creating master plan; but platting law refers to "general plan of said city, and its streets, alleys, parks, playgrounds, and public utility facilities . . ." also "general plan for the extension of such city and of its roads, streets . . . ."
[11] Plan for development of municipality has no effect aside from fact that plan is submitted to legislature.

TABLE III
CONTENTS OF THE MASTER PLAN

State	Title	Purpose	Components	Based Upon	MAY PROVIDE FOR THE FOLLOWING SUBJECTS (explicitly):[1]													
					Land Use	Site & Use of Bldgs.	Pop. density[2]	Streets Etc.	Public Utilities	Public Structures	Recreation Areas	Conservation & Reclamation[3]	Slum Clearance[3]	Urban Redev.[3]	Public Housing[3]	Public Works Progress	Government Expenditures
Standard Planning Act	M/P; municipal plan; official plan; the plan	". . . guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development; including, among other things, adequate provision for traffic, the promotion of safety from fire and other dangers, adequate provision for light and air, the promotion of the healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, and the adequate provision of public utilities and other public requirements"	(a) Accompanying maps, plats, charts, and descriptive matter (b) recommendations for development of the territory (c) zoning plan	Careful and comprehensive surveys and studies of present conditions and future growth, and with due regard to relation of city to neighboring territory, etc.	x	x	x	x	x	x	x						
Alabama	Same as SPA	Same as SPA	Same as SPA	Same as SPA	x	x	x	x	x	x	x						
Arizona (County)	County Plan; the plan	Guiding and accomplishing a coordinated, adjusted, and harmonious development of the area	(a) Recommendations (b) general zoning regulations (c) accompanying maps, plats, charts, and descriptive matter	Surveys and studies of present conditions and future growth	x	x	x	x									
Arkansas	Municipal plan; the plan	Substantially same as SPA	(a) Master street plan, with accompanying maps, plats, charts, and descriptive matter (b) reservations for mapped streets (c) zoning	Comprehensive study of present conditions and future growth of municipality and neighboring territory	x	x	x	x	x	x	x						
California	"Master plan . . . and official plans based thereon," "compre-	To conserve and promote public health, safety, and general welfare	(a) Comprehensive, long-term general plan for physical development of city and of such neighboring land as P/C	N/P	x	x	x	x	x	x	x	x	x		x	x	x

TABLE III—CONTINUED

State	Title	Purpose	Components	Based Upon	MAY PROVIDE FOR THE FOLLOWING SUBJECTS (explicitly):[1]													
					Land Use	Size & Use of Bldgs.	Pop. density[2]	Streets Etc.	Public Utilities	Public Structures	Recreation Areas	Conservation & Reclamation[3]	Slum Clearance[3]	Urban Redev.[3]	Public Housing[3]	Public Works Progress	Government Expenditures
	hensive, long term, general plan." (M/P or any part, upon adoption by legislature, becomes "official plan," but is also referred to as M/P after adoption)		considers related to city (b) accompanying maps, diagrams, charts, descriptive matter, and reports (c) any, all, or a combination of specified plans: conservation plan, land use plan, recreation plan, etc.; plus other plans that P/C may consider relevant to physical development of city														
Colorado	Municipal plan; official plan (upon adoption by P/C)	Same as SPA	Same as SPA	Same as SPA	x	x	x	x	x	x	x						
Connecticut	"A plan of development for the municipality"	To promote with the greatest efficiency and economy the coordinated development of the municipality and the general welfare and prosperity of its people	Recommendations re stated subjects or anything else in discretion of P/C	Studies of physical, social, economic, and governmental conditions and trends	x	x	x	x	x	x	x	x	x		x		
Delaware	Comprehensive development plan (adopted by P/C), official map (adopted by leg.)	To conserve and promote the public health, safety and general welfare (official map)	(Official map—plans for parks, public ways, private ways)	N/P				x	x	x[4]	x						
Florida[5]	N/P	N/P	N/P	N/P													
Georgia (Gen'l Stat.)	(a) Comprehensive plan	(a) To lessen congestion in streets, secure safety from fire, flood and erosion, provide light and air, promote health and general welfare, etc.	N/P	(a) Made with reasonable consideration to character of districts, promotion of desirable living conditions and sustained stability of neighborhoods, economy in government, etc.	x	x	x	x	x	x	x	x					
	(b) M/P	(b) For the systematic future development of municipality	(b) Plan and maps	(b) Resources, "possibilities," and needs of the municipality													
(Spec. Stat.)	M/P	Orderly growth and development of the district	Plan with maps, plats, charts, descriptive matter, showing recommendations	N/P		x	x	x	x	x	x						

TABLE III—CONTINUED

State	Title	Purpose	Components	Based Upon	MAY PROVIDE FOR THE FOLLOWING SUBJECTS (explicitly):[1]													
					Land Use	Size & Use of Bldgs.	Pop. density[2]	Streets Etc.	Public Utilities	Public Structures	Recreation Areas	Conservation & Reclamation[3]	Slum Clearance[3]	Urban Redev.[3]	Public Housing[3]	Public Works Progress	Government Expenditures
Idaho	Coordinated plans	Public health, morals, safety, and welfare	Suggestions in the form of coordinated plans, including zoning	N/P	x	x	x	x	x	x	x						
Illinois	Comprehensive plan of public improvements; official plan upon adoption by leg.	Looking to the present and future development; provide for health, safety, comfort, and convenience	Comprehensive plan	N/P	x	x	x	x	x	x	x			x			
Indiana	M/P; complete M/P or any of its parts, such as M/P of land use and zoning, and including ordinances deemed necessary to implement such complete M/P or part	Promotion of public health, safety, morals, convenience, order, general welfare . . . efficiency and economy in the process of development	May include: (1)careful and comprehensive surveys and studies (2) maps, plats, charts and descriptive material of existing conditions (3) reports, recommendations (4) long-range program of public works (5) long-range financial program	N/P	x	x	x	x	x	x	x	x	x			x	x
Iowa	Comprehensive plan; city plan	Substantially same as SPA	Comprehensive plan	Same as SPA													
Kansas[6]	N/P	N/P	N/P	N/P													
Kentucky	M/P	Same as SPA	Same as SPA	Substantially same as SPA	x	x	x	x	x	x	x	x[7]					
Louisiana	M/P	Same as SPA, plus "vehicular parking" as one of the purposes in view	Same as SPA	Substantially same as SPA	x	x	x	x	x	x	x					x	x
Maine	Comprehensive M/P	Health, safety, general welfare	May include zone plan and plat regulation plan	N/P	x	x	x	x	x	x	x	x	x				
Maryland	M/P	Same as SPA	Same as SPA, plus specifying that resolution shall refer expressly to maps and descriptive and other matters	Same as SPA	x	x	x	x	x	x	x[8]						
Massachusetts	Master or study plan	Official map is prepared to conserve and promote health, safety, and welfare	Master or study plan of city or parts; official map is separate	N/P	x	x	x	x	x	x	x						

TABLE III—CONTINUED

State	Title	Purpose	Components	Based Upon	MAY PROVIDE FOR THE FOLLOWING SUBJECTS (explicitly):[1]													
					Land Use	Size & Use of Bldgs.	Pop. density[2]	Streets Etc.	Public Utilities	Public Structures	Recreation Areas	Conservation & Reclamation[3]	Slum Clearance[3]	Urban Redev.[3]	Public Housing[3]	Public Works Progrss	Government Expenditures
Michigan	M/P	Same as SPA	Same as SPA	Same as SPA	x	x	x	x	x	x	x		x	x	x		
Minnesota[6]	N/P	N/P	N/P	N/P													
Mississippi[5]	N/P	N/P	N/P	N/P													
Missouri (1st Class Counties)	Official M/P	"For the purpose of bringing about coordinated physical development in accordance with present and future needs"	May include studies and recommendations	N/P				x		x	x	x					
Montana[9] (County)	N/P	N/P	N/P	N/P													
Nebraska[6]	N/P	N/P	N/P	N/P													
Nevada	M/P	Promote health, safety, morals, general welfare	Such of the following as are appropriate: (1) conservation plan } accompanying (2) land use plan } maps, charts, (3) recreation plan } reports (4) streets and highways plan (5) transportation plan (6) transit plan (7) public services and facilities (8) public buildings (9) community design (10) housing (11) economic plan (12) other plans related to physical development	N/P	x			x		x	x	x						x
New Hampshire	M/P	Same as SPA	Same as SPA	Substantially same as SPA	x	x	x	x	x	x	x							
New Jersey	M/P	Substantially same as SPA; except add after "in the process of development" the words:	Generally comprises land use, circulation and a report presenting the ob-	P/C shall give due consideration to the probable ability of the munici-	x	x	x	x	x	x	x	x	x	x	x			

TABLE III—CONTINUED

State	Title	Purpose	Components	Based Upon	MAY PROVIDE FOR THE FOLLOWING SUBJECTS (explicitly):[1]													
					Land Use	Size & Use of Bldgs.	Pop. density[2]	Streets Etc.	Public Utilities	Public Structures	Recreation Areas	Conservation & Reclamation[3]	Slum Clearance[3]	Urban Redev.[3]	Public Housing[3]	Public Works Progress	Government Expenditures
		"and the maintenance of property values previously established"	jectives, assumptions, standards, and principals which are embodied in the various interlocking portions of the M/P; M/P is a composite of the mapped and written proposals recommending the physical development of the municipality which the P/C shall have adopted either severally or as a whole; may include proposals for various stages in the future development of the municipality	pality to carry out the proposals without unreasonable financial burdens; careful and comprehensive surveys and studies of present conditions and the prospects for future growth of the municipality														
New Mexico	M/P	"Guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality which will, in accordance with existing and future needs, best promote health, safety, morals, order, convenience, prosperity, or the general welfare, as well as efficiency and economy in the process of development"	(a) Accompanying maps, charts, etc. (b) recommendations for development	Substantially same as SPA					x	x	x	x		x			
New York	M/P; official map or plan	Provide for the improvement of the city and its future growth, protection, and development, etc., including public convenience, health, safety, and welfare	Comprehensive M/P for development of entire area	N/P	x	x	x	x	x	x	x			x				
North Carolina[6]	N/P	N/P	N/P	N/P														
North Dakota	M/P	Same as SPA	Same as SPA plus recommendations for: (1) streets, playgrounds, parks, airports, etc. (2) public bldgs. and prop. (3) public utilities (4) other matters authorized by law	Same as SPA				x	x	x	x							

TABLE III—CONTINUED

State	Title	Purpose	Components	Based Upon	MAY PROVIDE FOR THE FOLLOWING SUBJECTS (explicitly):[1]													
					Land Use	Size & Use of Bldgs.	Pop. density[2]	Streets Etc.	Public Utilities	Public Structures	Recreation Areas	Conservation & Reclamation[3]	Slum Clearance[3]	Urban Redev.[3]	Public Housing[3]	Public Works Progress	Government Expenditures
Ohio	Plans or maps	Substantially same as SPA	Maps or plans	N/P	x	x	x	x	x	x	x						
Oklahoma (Cities over 160,000) (All Cities[6])	M/P	Substantially same as SPA, minus "other public requirements"	Same as SPA	Substantially same as SPA	x	x	x	x		x	x						
Oregon[10]	N/P	N/P	N/P	N/P													
Pennsylvania (1st Class)	Maps and recommendations: "city plan" mentioned, in passing, as one of recommendations on the maps	Provide for present conditions and future growth, etc.	Map or maps of city; recommendations	Regard to present conditions and future needs and growth of the city, location of streets, bldgs., etc.				x		x	x						
(2nd Class A)	Same as 1st class	Provide for present conditions and future growth, etc.	Map or maps of city; recommendations	Regard to present conditions and future needs and growth of the city, location of streets, bldgs., etc.	x	x	x	x		x	x						
(2nd Class)	M/P	Same as SPA	Same as SPA	Same as SPA	x	x	x	x	x	x	x						
(3rd Class)	Same as 1st Class	Same as 1st Class	Same as 1st Class	Same as 1st Class	x	x	x	x		x	x						
Rhode Island[11]	N/P	N/P	N/P	N/P													
South Carolina (Cities over 34,000)	M/P	Same as SPA	(a) Maps, charts, etc. (b) recommendations for development (c) specifically: (for Sumter) (1) location, character and extent of streets, parks, airports, etc. (2) location and extent of public utilities & terminals (3) removal, relocation, alteration of foregoing	Same as SPA	x	x	x	x	x	x	x		x				

TABLE III—CONTINUED

State	Title	Purpose	Components	Based Upon	MAY PROVIDE FOR THE FOLLOWING SUBJECTS (explicitly):[1]													
					Land Use	Size & Use of Bldgs.	Pop. density[4]	Streets Etc.	Public Utilities	Public Structures	Recreation Areas	Conservation & Reclamation[3]	Slum Clearance[3]	Urban Redev.[3]	Public Housing[3]	Public Works Progrm	Government Expenditures
			(4) height, area, bulk, location, use and intensity of use, bldgs., structures, premises and population density (5) location, character and layout of replanning blighted areas and slum areas (d) specifically: (for cities over 34,000) substantially same as Sumter plus zoning and neighborhood units														
South Dakota	M/P	Same as New Mexico	Same as SPA	Same as SPA	x	x	x	x	x	x	x		x				
Tennessee	Official general plan	Same as New Mexico	Same as SPA	Substantially same as SPA	x	x	x	x	x	x	x	x	x	x			
Texas[12]	N/P	N/P	N/P	N/P													
Utah	M/P	N/P	(a) Maps, charts, etc. (b) recommendations for physical development including streets	N/P				x	x	x	x						
Vermont	P/C adopts comprehensive plan; when voters subsequently adopt, it is official municipal plan	"Based primarily on public welfare"	N/P	N/P	[13]												
Virginia	M/P; municipal plan	Same as New Mexico	Same as SPA	Same as SPA, minus "due regard to relation of city to neighboring territory"	x	x	x	x	x	x	x						
Washington	Plans, coordinated plans	Most appropriate use of land; lessen traffic congestion and accidents, etc.; light and air,	N/P, except must be comprehensive	N/P; but commission empowered to make surveys, investigations, etc.	x	x	x					x					

TABLE III—CONTINUED

State	Title	Purpose	Components	Based Upon	MAY PROVIDE FOR THE FOLLOWING SUBJECTS (explicitly):[1]													
					Land Use	Size & Use of Bldgs.	Pop. density[2]	Streets Etc.	Public Utilities	Public Structures	Recreation Areas	Conservation & Reclamation[3]	Slum Clearance[3]	Urban Redev.[3]	Public Housing[3]	Public Works Progress	Government Expenditures
		fire, overcrowding; coordinated development of unbuilt areas; to encourage formation of neighborhood or community units; to secure an appropriate allotment of land area in new developments for all the requirements of community life; to conserve and restore natural beauty, etc.															
West Virginia	A plan for development	N/P	Recommendations for new streets, bridges, parks, parkways, playgrounds, & any other public areas or public improvements	N/P				x			x						
Wisconsin	M/P	Same as New Mexico	Same as SPA	N/P	x	x	x	x	x	x	x		x				
Wyoming[5]	N/P	N/P	N/P	N/P													

[1] It is frequently a difficult question of interpretation as to what it is the master plan is making plans for.
[2] Often only implicit under "zoning" or "land use."
[3] Often related to the master plan in other, separate acts.
[4] Sites only.
[5] No planning enabling act.
[6] No formal master plan.
[7] 1st Class cities only.
[8] Expressly excludes power over transmission lines owned in Baltimore County.
[9] Total effect is zoning, but there is a "development pattern" for "physical and economic development of zoning district."
[10] No formal master plan, but planning commission can make plans and recommendations for streets, zoning, relief of traffic congestion, future growth and beautification of city, regulation of industrial or economic needs, location of public and private buildings.
[11] Planning board to report annually to council, recommending plans and schemes of development, giving costs.
[12] See note 10 on Chart II.
[13] Planning commission makes plans for future development; recommended zoning for height, ground area, and use.

TABLE IV
LEGAL IMPACT OF MASTER PLAN ON PRIVATE DEVELOPER

State	Binding Effect of M/P on P/C, in General	ZONING					
		Who Prepares Zoning Plan	Relationship to M/P	Who Adopts	Hearing	Who Amends	Hearing
Standard Planning Act	Platting, upon approval by P/C, constitutes an addition to or amendment of M/P	P/C receives powers heretofore granted to Z/C; may allow existing Z/C to finish project—not exceeding 6 months	Zone plan constitutes part of M/P	Assumes prior zoning enabling act	Assumes prior zoning enabling act	Assumes prior zoning enabling act	Assumes prior zoning enabling act
Alabama	Same as SPA	P/C	Same as SPA	Leg., upon recommendation of P/C	Yes	(1) Same as adoption (2) P/C may agree with application for plat as to any restrictions that do not violate the zoning law; such restrictions must be stated on the plat prior to approval & recording, & upon approval and recording become, in effect, a part of the zoning ordinance	Yes
Arizona (County)	Upon adoption by County Board of Supervisors, plan becomes the official guide for development of the area of jurisdiction, & amendments may be made only as provided by statute	P/C	"General zoning regulations" constitute a part of M/P	County Board, & then local referendum of record owners of real property	N/P	Board acts upon recommendation of P/C, which may be made on own motion of P/C or by written petition of property owners; board vote must be unanimous if protest made by 20% of owners of property	Yes
Arkansas	N/P	P/C	M/P may include a zoning plan	Council	Yes	Council may amend or abolish M/P	N/P

TABLE IV

LEGAL IMPACT OF MASTER PLAN ON PRIVATE DEVELOPER

SUBDIVISION CONTROLS				STREET CONTROLS				
Must P/C Adopt Regs. Before Exercising Subdiv. Approval	Hearing on Specific Application	P/C Approval Necessary	Other Approval Necessary or Possible	Improvements in Unaccepted Streets	Provision Re Access of Bldg. to Streets	Provision Re Bldg. in Mapped Streets	Hearing Re Mapped Streets	Other Approval Necessary or Possible Re Mapped Streets
Yes	Yes	Yes	N/P	Street shall not be accepted or improved except by majority of council, with approval of P/C, or by 2/3 of council, over P/C disapproval, if street does not correspond with official master plan, subdiv. plat approved by P/C, or area plat adopted by P/C	After adoption of major street plan for an area, no building is allowed unless access street is accepted, or corresponds with street shown on official master plan, subdiv. plat approved by P/C, or area plat adopted by P/C	(1) After adoption of major street plan for an area, P/C may adopt area plats showing mapped streets; owner who builds in a mapped street during the period for which the plat is reserved by council, cannot recover compensation if street is constructed; (2) P/C & owner may modify the area plat by subsequent agreement	Yes	(1) Council may approve and adopt or may reject the area plat; or may modify it with approval of P/C, or without such approval if voted by 2/3 of council: (2) the agreement must be approved by the council, at which time it replaces original area plat; (3) council may abandon a reservation at any time
N/P	Yes	Yes	N/P	Same as SPA	Same as SPA	Same as SPA	Yes	Same as SPA
N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Yes	N/P	Yes	N/P	N/P	Council may regulate or prohibit the granting of permits for bldgs. on lots not located on streets shown on the master street plan	Council, on recommendation of P/C, establishes, regulates, and limits bldg. or set-back lines on major highways shown on "plan for a major street system" adopted by P/C	N/P	Bd. of Adjustment may vary these regulations in case of unwarranted hardship

TABLE IV—CONTINUED

State	Binding Effect of M/P on P/C, in General	ZONING					
		Who Prepares Zoning Plan	Relationship to M/P	Who Adopts	Hearing	Who Amends	Hearing
California[1]	P/C can only recommend that leg. amend M/P; P/C can amend M/P (prior to adoption by leg.) by same procedure by which P/C adopts plan; precise plans are based on M/P	Apparently anticipates preparation by P/C, although leg. can adopt a zoning plan on its own initiative, in which case refers to P/C for hearing & report	As a precise plan, zoning should be based upon M/P, at least if zoning is prepared by P/C; but adoption of M/P is not necessary to initiation or adoption of zoning	Leg.	If recommended by P/C, yes, if not, N/P	Same as adoption	Same as adoption
Colorado	Same as SPA	P/C	Same as SPA	Leg., upon recommendation of P/C	Yes	Same as SPA (1) and (2), but must be approved by leg.	(1) Yes (2) No
Connecticut	Subdiv. regs. must provide that streets in proposed subdiv. must be in harmony with plan of development	Z/C, which may but need not be P/C	Zoning regs. must be in accordance with a comprehensive plan	Z/C, in manner determined by Z/C	Yes	As determined by Z/C	Yes
Delaware	Such M/P shall be a public record, but its purpose and effect shall be solely as aid to P/C in performance of duties	Z/C	N/P	Leg.	Yes	Leg.; must be by 3/4 vote if protest from owners of 20% of prop. within 100′	Yes
Florida[2]	N/P	Z/C (provision that P/C *may* act as Z/C)	N/P	Governing body, in accord with charter	Yes	Leg.; must be by 3/4 vote if protest from owners of 20% of prop. within 500′	Yes
Georgia (Gen'l Stat.)	N/P	P/C	Zoning regulations must be in accordance with "a comprehensive plan"	P/C & Leg. P/C prepares & certifies to leg.; no change by leg. without referral to P/C, but leg. not bound by P/C	Yes	Leg., after referral to P/C for advice, which is not binding on leg.	Yes
Idaho	N/P	P/C	Zoning is one of recommendations in M/P	Leg.	Yes	Leg.; if 20% protest within 300′; must be by 3/4 vote of members	Yes
Illinois	P/C can only suggest changes in official plan	Z/C (may be P/C) (appointed by mayor, confirmed by council)	Zoning may be part of recommendation of P/C	Leg., after recommendations of Z/C which are not binding	Yes	Leg.	Yes

TABLE IV—CONTINUED

SUBDIVISION CONTROLS				STREET CONTROLS				
Must P/C Adopt Regs. Before Exercising Subdiv. Approval	Hearing on Specific Application	P/C Approval Necessary	Other Approval Necessary or Possible	Improvements in Unaccepted Streets	Provision Re Access of Bldg. to Streets	Provision Re Bldg. in Mapped Streets	Hearing Re Mapped Streets	Other Approval Necessary or Possible Re Mapped Streets
P/C has such control over subdivs. as granted by regulations adopted by leg.	N/P	N/P	N/P	Even if P/C disapproves, street can be accepted or improved by majority vote of leg.	N/P	N/P	N/P	N/P
P/C must first adopt regulations	Yes	P/C jurisdiction over plats is exclusive; upon adoption of major street plan by P/C, & recording, no subdiv. without approval of P/C	N/P	Same as SPA	Same as SPA	Same as SPA	Same as SPA	Same as SPA
Yes	Yes	Yes	N/P	Street shall not be accepted or improved except after referral to P/C; P/C can be overruled by 2/3 of council or by maj. of town meeting	N/P	No bldg. without P/C approval of plat	Yes	N/P
In New Castle county, P/C must approve the plats	Yes	Yes	N/P	N/P	N/P	N/P	N/P	N/P
N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
P/C bound by regs. adopted by leg., upon advice of P/C	Yes	P/C does not approve, but sends plat, with a recommendation, to leg. for determination	N/P	N/P	N/P	N/P	N/P	N/P
N/P	N/P	P/C makes suggestions to council re platting or subdiv.	N/P	N/P	N/P	N/P	N/P	N/P
N/P	N/P	N/P	Streets and public grounds in subdiv. must	N/P	Plat must conform with M/P re access	N/P	N/P	N/P

TABLE IV—CONTINUED

State	Binding Effect of M/P on P/C, in General	ZONING					
		Who Prepares Zoning Plan	Relationship to M/P	Who Adopts	Hearing	Who Amends	Hearing
Indiana	After adoption of "the M/P and ordinance" govt. agencies shall be guided by and give consideration to the general policy and pattern of development set out in M/P	P/C	N/P, but zoning "an integral part of the planning of areas"; M/P may include material on zoning	Leg., after P/C recommendation; but ord. may give P/C power to make reasonable zoning changes in new plats, provided that P/C can't allow greater pop. density or cover of land	Yes	Unless P/C makes proposal, referred to P/C; if P/C disapproves must be by 3/4 vote of leg.	Yes
Iowa	N/P	Z/C (may be P/C)	None stated, but zoning must be based on "a comprehensive plan"	Leg. upon recommendations of Z/C	Yes	Same as adoption	Yes
Kansas	N/P	P/C	N/P	Leg.	Yes	N/P	N/P
Kentucky	N/P	P/C	Zoning recomendation in M/P	Leg.	Yes	If 35% protest within 150', must be by 3/4 vote	No specific provision, but probably "Yes" under adoption provision
Louisiana	N/P	P/C	Zoning plan is part of M/P	Leg.	Yes	Leg., by 3/5 vote if 20% protest within 200'	Yes
Maine	In report & recommendations on plat applications, P/C must determine if plat fits with M/P	P/C	Zoning plan is part of M/P	Leg., but if it varies from P/C recommendations must be by 4/5 vote	Yes	N/P	Yes
Maryland	N/P	P/C	Zoning plan is part of M/P	Leg.	Yes	Leg.; 2/3 vote if 20% protest within 175'	Yes
Massachusetts	Approved subdiv. becomes part of official map	Leg. & P/C	Zoning may be part of M/P	Leg.	Yes	Leg. by a 2/3 vote after report from P/C, which holds hearings; 3/4 vote required if	Yes

TABLE IV—CONTINUED

SUBDIVISION CONTROLS				STREET CONTROLS				
Must P/C Adopt Regs. Before Exercising Subdiv. Approval	Hearing on Specific Application	P/C Approval Necessary	Other Approval Necessary or Possible	Improvements in Unaccepted Streets	Provision Re Access of Bldg. to Streets	Provision Re Bldg. in Mapped Streets	Hearing Re Mapped Streets	Other Approval Necessary or Possible Re Mapped Streets
			conform with official plan					
No formal regs, but P/C may control: (1) street layout (2) water & utility provisions (3) school provisions (4) municipal services (5) recreational facilities	Yes	Yes	P/C shall have exclusive control	N/P	N/P	N/P	N/P	N/P
N/P	N/P	All plats must be submitted to P/C for recommendations before adoption by council; final approval by council	Must go to P/C for recommendations before council approves	Must go to P/C for recommendations before council approves	N/P	N/P	N/P	N/P
Yes	N/P	P/C acts on application & makes its recommendations to leg. which must act	Leg.	N/P	N/P	N/P	N/P	N/P
Yes	Yes	Yes	Person aggrieved may appeal to circuit court of county	Same as SPA	Same as SPA	Same as SPA	N/P	N/P
Yes	Yes	Yes	N/P	Same as SPA	Same as SPA	N/P	N/P	N/P
P/C & city engineer to report to leg. for adoption	Yes	Yes	4/5 vote of leg.	P/C can be overrridden by 4/5 leg. vote	No subdiv. requiring access until plat approved	No bldg. unless by variance by board of appeals	N/P	Board of appeals may grant variance
Platting regs. adopted by leg.	N/P	Yes	N/P	Substantially same as SPA	No bldg. is allowed unless access street is on official map	No permit for bldg. in bed of mapped streets	Yes	Bd. of zoning appeals may give variance
Yes	Yes	Yes	N/P	No acceptance or improvement of way, unless appears	No bldg. permit unless way giving access appears	Towns may prevent bldg. within street lines, but must	No	N/P

TABLE IV—CONTINUED

State	Binding Effect of M/P on P/C, in General	ZONING					
		Who Prepares Zoning Plan	Relationship to M/P	Who Adopts	Hearing	Who Amends	Hearing
						20% protest, within 300′	
Michigan	Same as SPA	P/C	Zoning is part of M/P	Zoning passed upon first by bd. of supervisors, then by state P/C, then by local election	Yes	Same as SPA (1) and (2)	(1) Yes (2) No
Minnesota	N/P	P/C in 1st class city	N/P	Leg.	Yes	Leg. by 2/3 vote	Yes
		N/P	N/P	3rd, 4th class, leg.; if protest by 10% of freeholders, must have election	N/P	2/3 vote of leg.	
		N/P	N/P	2nd class city, leg.	N/P	2nd class city, leg. by 2/3 vote	N/P
Mississippi[2]	N/P	City engineering dept. or advisory committee of citizens	N/P	Leg.	Yes	Leg.; 2/3 vote if 20% protest, within 160′	Yes
Missouri (1st Class Counties)	N/P	P/C	N/P	Leg.	Yes	Leg.	No specific provision, but probably "Yes" under adoption provision
(Cities)	N/P	Z/C or P/C	N/P	Leg.	Yes	Leg.; 3/4 vote if 10% protest, within 185′	Yes
Montana (County)	N/P	P/C	Zoning seems to be the only function of P/C	P/C for a district (not less than 1 sq. mi) after petition by 60% of freeholders; P/C adopts by majority vote	Yes	N/P	N/P
Nebraska	N/P	Z/C or P/C		Leg.	Yes	Leg.; 3/4 vote if 20% protest within 100′	Yes
		P/C in metro. class city	Must have "city plan"			5/7 in metro. class city	

TABLE IV—CONTINUED

SUBDIVISION CONTROLS				STREET CONTROLS				
Must P/C Adopt Regs. Before Exercising Subdiv. Approval	Hearing on Specific Application	P/C Approval Necessary	Other Approval Necessary or Possible	Improvements in Unaccepted Streets	Provision Re Access of Bldg. to Streets	Provision Re Bldg. in Mapped Streets	Hearing Re Mapped Streets	Other Approval Necessary or Possible Re Mapped Streets
				in subdiv. approved by P/C, or in official map, except by 2/3 vote of leg.	in approved subdiv. plat or in official map	pay damages for injury to property		
Yes	Yes	Yes	N/P	N/P	N/P	After adoption of M/P, P/C prepares and certifies to leg. precise plans for street extensions or improvements; leg. can provide that no bldg. take place in these proposed improvement areas	Yes	Provision for bd. of appeals for hardship cases
1st class city may delegate to P/C the adoption of regs.	Yes, in 1st class city	Leg. may prescribe regs.; no P/C approval needed except in 1st class cities	N/P	Can be authorized by majority of leg. with P/C approval, or by 2/3 leg. without P/C approval	No. bldg. allowed unless access street accepted in 1st class cities	No permit for bldg. in bed of mapped streets	Yes	Board of zoning appeals may give variance
N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Yes	N/P	If P/C does not approve, leg. may, stating reasons	Leg.	N/P	N/P	P/C may, by order, prohibit bldg.	N/P	Bd. of zoning adjustment may overrule P/C for hardship
		Bd of pub. works must approve plats (evidently for grading of streets, etc., only)						
N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
N/P	N/P	N/P	N/P	N/P	N/P	N/P, except where plat recorded; plat acts as deed in fee simple in re	N/P	N/P

TABLE IV—CONTINUED

State	Binding Effect of M/P on P/C, in General	ZONING					
		Who Prepares Zoning Plan	Relationship to M/P	Who Adopts	Hearing	Who Amends	Hearing
		N/P for primary class city	N/P	N/P	N/P	N/P	N/P
Nevada	Platting regs. may only cover street & drainage, unless ord. on platting; P/C probably also bound	N/P	N/P	Leg.	Yes	N/P	Yes
New Hampshire	P/C may use discretion in approving plats	Same as SPA	Same as SPA	Leg.	Yes	Leg.; by 3/4 vote if 20% protest, within 100′	Yes
New Jersey[3]	P/C may require that subdiv. conform with M/P; subdiv. must conform to official map	Z/C or P/C (wherever there is P/C, it shall act as Z/C)	Zoning recommendations may be part of M/P	Leg., after reports & hearings by P/C	Yes	Leg., but only by 2/3 if disapproved by P/C, or if 20% protest, 100′	N/P
New Mexico	Same as SPA	Z/C; P/C or leg.	N/P	Leg.	Yes	Leg. by 3/4 vote if 20% protest, within 100′	Yes
New York	P/C must require that subdiv. streets conform to official map, and properly relate to M/P	Leg. & P/C	Zoning may be part of M/P	Leg.	N/P	Leg.; by 3/4 vote if 20% protest, within 100′; when approving plat, P/C can make reasonable modifications of zoning law, (within limitations prescribed by leg.) except that pop. density cannot be increased	Yes
North Carolina	N/P	Z/C or P/C	N/P	Leg.	Yes	Leg.; 3/4 vote if 20% protest, within 100′	Yes
North Dakota	In considering plat, P/C may take into account character of development of area	Z/C or P/C	N/P	Leg.	Yes	Leg.; 3/4 vote if 20% protest, within 150′	Yes
Ohio	N/P	P/C	N/P	Leg., when plan is certified to it by P/C; if it differs from report	Yes	Leg., but submit to P/C for approval or disapproval; 3/4 vote	N/P

TABLE IV—CONTINUED

SUBDIVISION CONTROLS				STREET CONTROLS				
Must P/C Adopt Regs. Before Exercising Subdiv. Approval	Hearing on Specific Application	P/C Approval Necessary	Other Approval Necessary or Possible	Improvements in Unaccepted Streets	Provision Re Access of Bldg. to Streets	Provision Re Bldg. in Mapped Streets	Hearing Re Mapped Streets	Other Approval Necessary or Possible Re Mapped Streets
						streets or charitable, religious, educational institutions		
Yes	N/P	Yes	Governing body may overrule P/C by maj. vote if subdivider dissatisfied	N/P	N/P	N/P, except that title passes to city when plat approved	N/P	N/P
Yes	Yes	N/P	N/P	Same as SPA	Same as SPA	Leg. may provide by ord. that no such permits allowed	N/P	Board of adjustment can grant variance
Contingent upon regs. adopted by eg.; P/C may require that subdiv. conform to M/P; must conform to official map	Yes	Plats approved by local leg. or P/C if leg. so prescribes	Subsequent approval of leg. may or may not be required; appeal may always be taken to leg., which may affirm or reverse by a majority vote	N/P	No bldg. without access street appearing on official map, or approved on plat prior to passage of enabling act	No bldg. in bed of streets or drainage rt. of way, etc., on official map; if P/C has adopted M/P, local legislature must refer official map on amendment thereof to P/C for its recommendation (which is purely advisory)	Yes	Board of appeals may grant variance
Yes	Yes	N/P	N/P	Same as SPA	N/P	Upon approval of plats, city gets title to street area	N/P	N/P
Yes	N/P	Yes; regardless of M/P, no plat showing new street can be filed without approval of P/C	N/P	No improvements in any street until placed on official map or plan	No permit for bldg. unless P/C approves access streets, even though placed on official map or plan, as "suitably improved"	No bldg. in streets shown on official map or plan	N/P	Board of appeals may grant variance
N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Yes	Yes	Yes	N/P	Same as SPA	Same as SPA	N/P	N/P	N/P
Yes	N/P	If P/C adopts a street plan and open space	N/P	N/P	N/P	Plat recording vests title of land in munici-	N/P	N/P

TABLE IV—CONTINUED

State	Binding Effect of M/P on P/C, in General	ZONING					
		Who Prepares Zoning Plan	Relationship to M/P	Who Adopts	Hearing	Who Amends	Hearing
				submitted by P/C, need 3/4 vote of full membership		needed if disapproval	
Oklahoma (Cities over 160,000)	N/P	P/C or Z/C	Same as SPA	Leg.	Yes	Leg., 3/4 vote if 20% protest, abutting	Yes
(All Cities)	N/P	P/C or Z/C	No M/P	Leg.	Yes	Leg., 3/4 vote if 20% protest, abutting	Yes
Oregon	N/P	P/C	N/P	Leg.	Yes	N/P	N/P
Pennsylvania (1st Class)	N/P	Z/C	N/P	Council, by approval of Z/C regulations	N/P	N/P	N/P
(2nd Class A)	N/P	P/C	N/P	Council, after reports & hearings by P/C	Yes	Council, by 3/4 vote if protest	Yes
(2nd Class)	Plat approved by P/C becomes amendment to M/P	P/C	N/P	Council, after reports and hearings by P/C	Yes	Leg. on recommendation of P/C; 3/4 vote if 20% protest, within 100′	Yes
(3rd Class)	N/P	Z/C (may be P/C)	N/P	Council, after reports and hearings by Z/C	Yes	Council after hearings	Yes
Rhode Island	N/P	Committee or commission authorized by council	N/P	Leg.	Yes	Leg.; 3/5 vote if 20% protest—adjacent, if mayor approves; when mayor doesn't approve, by such margin as is required in case of ords.	Yes
South Carolina (Cities over 34,000)	N/P	Z/C or P/C[4]	Same as SPA	Leg.	Yes	Leg.; 3/4 vote if 20% protest, adjacent	Yes

TABLE IV—CONTINUED

SUBDIVISION CONTROLS				STREET CONTROLS				
Must P/C Adopt Regs. Before Exercising Subdiv. Approval	Hearing on Specific Application	P/C Approval Necessary	Other Approval Necessary or Possible	Improvements in Unaccepted Streets	Provision Re Access of Bldg. to Streets	Provision Re Bldg. in Mapped Streets	Hearing Re Mapped Streets	Other Approval Necessary or Possible Re Mapped Streets
		plan, then its approval necessary on plat				pality of area proposed for streets, alleys, ways, commons, or other public uses		
Yes	Yes	N/P	N/P	Same as SPA	Same as SPA	Same as SPA, except omission of sanction of no compensation	N/P	Same as SPA
N/P	N/P	See next column	Leg. must submit proposed plats to P/C for approval or rejection before leg. takes action	N/P	N/P	N/P	N/P	N/P
Yes	N/P	P/C must approve plats	Under another stat. city engineer must approve plats for street plan, taxes having been paid	N/P	N/P	N/P	N/P	N/P
N/P, except that P/C can make recommendations to private citizens re improvements, etc.	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
N/P	N/P	Yes	N/P	N/P	N/P	N/P	N/P	N/P
Yes	N/P	Yes	N/P	Same as SPA	Same as SPA	Same as SPA	N/P	Same as SPA
N/P	N/P	Yes	N/P	N/P	N/P	N/P	N/P	N/P
N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Yes	Yes	N/P	N/P	Same as SPA	N/P	Same as SPA, except omission of sanction of no compensation	N/P	Same as SPA

TABLE IV—CONTINUED

State	Binding Effect of M/P on P/C, in General	ZONING					
		Who Prepares Zoning Plan	Relationship to M/P	Who Adopts	Hearing	Who Amends	Hearing
South Dakota	N/P	P/C	Same as SPA	Leg., unless protest of 40% of aggregate lots included plus 150′—then not effective as to that zone	Yes	Leg., unless protest of 40% of aggregate lots included plus 150′—then no amendment possible; leg. may require petition of up to 60% of those who have protest right	Yes
Tennessee	N/P	P/C	Same as SPA	Leg.	Yes	Leg., but must first be submitted and approved by P/C; if disapproved, then adoption by majority of the full membership necessary	N/P
Texas	If there is a general plan, and subdiv. plats conform to it, then P/C or leg., as case may be, must endorse their approval	Z/C; where P/C exists it may be appointed Z/C	N/P	Leg., but not until it receives first report from Z/C	Yes	Leg., but 3/4 vote needed if protest by owners of 20% of prop. within 200′	Yes
Utah	N/P	"Leg. may appoint" a planning commission	N/P	Leg.; departure from recommendation must be submitted to P/C for consideration & recommendation	Yes	Leg.; must be submitted first to P/C for recommendation	Yes
Vermont	N/P	N/P, except P/C may recommend zoning ords.	N/P, except that P/C may recommend zoning ords.	Voters, in town meeting	Yes	Leg.; but if 20% protest, by unanimous vote; leg. may submit amend. to voters for advisory approval	Yes
Virginia	N/P	P/C	Same as SPA	Leg.	Yes	Leg.; 3/4 vote if 20% protest, adjacent; 300′ if cities adjoin counties over 1000 sq. mi.	Yes
Washington	Plat must be approved if adequate provision for streets,	P/C	N/P	Leg. upon P/C recommendations	N/P	Leg. with recommendation or concurrence of P/C	N/P

TABLE IV—CONTINUED

SUBDIVISION CONTROLS				STREET CONTROLS				
Must P/C Adopt Regs. Before Exercising Subdiv. Approval	Hearing on Specific Application	P/C Approval Necessary	Other Approval Necessary or Possible	Improvements in Unaccepted Streets	Provision Re Access of Bldg. to Streets	Provision Re Bldg. in Mapped Streets	Hearing Re Mapped Streets	Other Approval Necessary or Possible Re Mapped Streets
Regs. adopted by council after recommendation by P/C	Yes	On specific application council, not P/C, has power to act; but must refer to P/C first	Council	Same as SPA	N/P	N/P	N/P	N/P
Yes	Yes	Yes	N/P	No improvement unless approval of P/C, or by majority vote of full membership over P/C disapproval	No bldg. permit unless street giving access to lot is accepted	N/P	N/P	N/P
Platting regs.; adopted by leg.	N/P	Yes, if no P/C, then approval by leg.; if there are regs., approval required if regs. complied with	N/P	N/P	N/P	N/P	N/P	N/P
P/C may prepare regs. to be adopted by leg.	N/P	After P/C adopts major street plan, legis. approval needed, as well as that of P/C	Leg.	Leg. (or other agency involved) may overrule P/C by majority vote	N/P	Recording of plat dedicating street, or if official map adopted, no bldg. in mapped streets	N/P	Board of adjustment may grant variance
N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P
Regs. must be adopted by leg.	N/P	Plats need approval of leg. or other body, including P/C which ord. may designate; in cities under 100,000 then city eng. must approve if city has adopted official map for development of thoroughfares	Leg.	Same as SPA	N/P	N/P	N/P	N/P
Yes, and must be approved by leg.	Yes	Leg. approves subdivs., but if P/C exists it	Leg., if no P/C	N/P	N/P	N/P	N/P	N/P

TABLE IV—CONTINUED

State	Binding Effect of M/P on P/C, in General	ZONING					
		Who Prepares Zoning Plan	Relationship to M/P	Who Adopts	Hearing	Who Amends	Hearing
	parks, playgrounds, & that pub. interest served						
West Virginia	N/P	Z/C or P/C	N/P	Leg.	Yes	Leg.; 3/4 vote if 20% protest within 100′	Yes
Wisconsin	"The purpose & effect of the adoption & certifying of the master plan or part thereof shall be solely to aid the city P/C and the council in the performance of their duties	P/C with hearing	Same as SPA	Leg.; but 3/4 vote if 20% protest, within 100′, if change from P/C recommendation	Yes	No specific provision but presumably same as adoption	N/P
Wyoming[2]	N/P	P/C or Z/C	N/P	Leg.	Yes	Leg.; 3/4 vote if 20% protest within 140′	Yes

[1] After adoption of Master Plan by legislature, it becomes duty of legislature, upon recommendation of Planning Commission, to determine upon reasonable and practical means for putting Master Plan into effect (Sec. 71); Planning Commission may recommend, and legislature may adopt, such measures as may be necessary to insure execution of Master Plan.

[2] No planning enabling act.

[3] If shown on Master Plan, Planning Commission may require shown sites for schools, public parks, and playgrounds to be reserved for at least one year after approval of plat.

[4] According to zoning statute, either, even though a zoning plan is part of the master plan. In cities over 34,000 ,the planning commission takes over duties of the zoning commission.

TABLE IV—CONTINUED

SUBDIVISION CONTROLS				STREET CONTROLS				
Must P/C Adopt Regs. Before Exercising Subdiv. Approval	Hearing on Specific Application	P/C Approval Necessary	Other Approval Necessary or Possible	Improvements in Unaccepted Streets	Provision Re Access of Bldg. to Streets	Provision Re Bldg. in Mapped Streets	Hearing Re Mapped Streets	Other Approval Necessary or Possible Re Mapped Streets
		has control						
N/P	N/P	Plats must be submitted to P/C for report; Mayor & Council must approve	Mayor & Council	N/P	N/P	N/P	N/P	N/P
Regs. adopted by leg., on recommendation of P/C	N/P	Council must approve plat; council must refer plat to P/C for report	Council	No improvements until street placed on official map	No bldg. permit until access streets placed on official map	No bldg. in streets shown on official map	N/P, except where official map is changed	Board of appeals may grant variance
N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P	N/P

TABLE V

LEGAL IMPACT OF MASTER PLAN ON PUBLIC DEVELOPER

State	When Does M/P Become Effective	Result of Making M/P Effective	Other Approval Provided in Addition to or in Lieu of P/C's, for Public Construction after M/P Becomes Effective
Standard Planning Act	Adoption by P/C	No street, square, park, other public way, ground or open space, or public bldg. or structure, or public utility, publicly or privately owned, shall be constructed without approval of P/C	Disapproval of P/C may be overridden by 2/3 vote of council or of the agency with jurisdiction in the matter
Alabama	Adoption by P/C	Same as SPA	Same as SPA
Arizona (County)	Zoning plan becomes effective, after adoption by County Board, by local option M/P effective upon adoption by Board, which may disregard P/C recommendations	M/P becomes official guide for development of the area	N/P
Arkansas	Upon adoption and filing	Same as SPA	Disapproval of P/C may be overridden by 3/4 of council, or by 2/3 of agency with jurisdiction
California	Adoption by leg.	Substantially same as SPA; report of P/C considers "whether . . . such public improvement conforms to the adopted M/P"; after adoption of M/P by leg., P/C makes recommendations on Capital Budget	Disapproval of P/C may be overridden by majority vote of leg.
Colorado	Adoption by P/C	Same as SPA	Same as SPA
Connecticut	On date set by P/C	Not necessary to make M/P effective; no public work can be started by municipal agency without P/C approval	P/C can be overridden by 2/3 of council, or by majority of voters in town meeting
Delaware	Adoption by leg. as "official map"	No streets or parks except in accordance with official map	Action may be taken after a P/C report or after 45 days
Florida[1]	N/P	N/P	N/P
Georgia (Gen'l Stat.)	N/P	N/P	N/P
(Spec. Stat.)[2]	M/P is advisory only	N/P	N/P
Idaho	M/P is advisory only	N/P	N/P
Illinois	N/P	N/P	N/P
Indiana	By leg. as "ordinance" adoption	Leg. "shall be guided by and give consideration to M/P"	N/P
Iowa	Becomes "official plan" upon approval by council of plan adopted by P/C	No work of art, public bldg., public structure, etc., without submission to P/C for recommendation as to design and location (no need to pass M/P) No plan for any public improvement affecting the city plan can be approved prior to submission to P/C for recommendation	N/P
Kansas[3]	M/P	N/P	N/P
Kentucky	Adoption by P/C	Same as SPA	Same as SPA

TABLE V—CONTINUED

State	When Does M/P Become Effective	Result of Making M/P Effective	Other Approval Provided in Addition to or in Lieu of P/C's, for Public Construction after M/P Becomes Effective
Louisiana	Adoption by P/C	Same as SPA	Same as SPA
Maine	Adoption by P/C	Public bldgs., structures, utilities, streets must be referred to P/C for recommendation	4/5 vote of leg. override P/C
Maryland	Adoption by P/C	Same as SPA	Same as SPA
Massachusetts	"Official map," upon adoption by leg.	No public way unless on official map	N/P
Michigan[4]	Adoption by P/C	Same as SPA; any street improvement or land acquisition voted by leg. cannot be rescinded without P/C approval, after pub. hearing, except by 2/3 vote of leg.	Same as SPA
Minnesota	N/P	In 1st class city, on adoption of major street plan, no streets, sewers, water mains contra to plan	1st class city 2/3 of city council in lieu of P/C approval; otherwise only majority vote necessary
Mississippi[1]	N/P	N/P	N/P
Missouri[5] (1st Class Counties)	Adoption by P/C	Leg. must submit plans for improvements to P/C	Leg. may approve over P/C's objection—must state reasons
Montana (County)	Adoption by P/C	N/P	N/P
Nebraska	N/P	N/P	N/P
Nevada	Adoption by leg.	Same as SPA	If P/C disapproves, leg. may proceed by maj. vote; if any other agency is in charge, then 2/3 vote of that agency
New Hampshire	Adoption by P/Board	Same as SPA	Same as SPA; or by maj. vote in town meeting
New Jersey	Adoption by P/C	(1) No public body can undertake public projects without referral to P/C (2) After adoption of M/P, P/C must also make report prior to adoption of official map (of streets, parks, etc.). (3) Redevelopment plan must conform to M/P "as finally approved by the governing body"	If P/C disapproves, gov. agency can override only by a majority vote of entire membership, which must be approved by leg.
New Mexico	Adoption by P/C	Same as SPA; does not apply to repair, alteration, or continuance of existing pub. utility; for improvements and betterments, P/C has absolute say subject only to New Mexico State Corporation Commission, which may allow such betterments	Same as SPA
New York	Adoption by P/C	Regardless of M/P, P/C approval may be required on streets and highways; no public improvement without P/C approval of streets and access	N/P
North Carolina[3]	N/P	N/P	N/P
North Dakota	Adoption by leg.	Substantially same as SPA minus "utilities"	Same as SPA
Ohio	Adoption by P/C	Same as SPA; narrowing, ornamentation, varia-	Disapproval may be overridden by 2/3

TABLE V—CONTINUED

State	When Does M/P Become Effective	Result of Making M/P Effective	Other Approval Provided in Addition to or in Lieu of P/C's, for Public Construction after M/P Becomes Effective
		tion or changes in use of streets and other public ways, grounds and places subject to P/C approval	of council and dept. head proposing the construction
Oklahoma (Cities over 160,000)	Adoption by leg.	Substantially same as SPA, minus "utilities"	Same as SPA, except that in case of agency which is appointed, the 2/3 vote must be in the leg.
(All Cities)	On some items, leg. must refer to P/C before approval		
Oregon	No M/P; leg. must submit plans for public bldgs., bridges, parks, playgrounds, etc., to P/C for report		Report of P/C has no binding effect unless law or ordinance so states
Pennsylvania (1st Class)	N/P	N/P	N/P
(2nd Class A)	N/P	N/P	N/P
(2nd Class)	Same as SPA	Same as SPA	Disapproval of P/C may be overridden by majority vote of leg.
(3rd Class)		Regardless of M/P, P/C must report on all bills for public improvement, but disapproval not a veto	
Rhode Island	N/P	N/P	N/P
South Carolina (Cities over 34,000)	Adoption by P/C	Same as SPA	Same as SPA
South Dakota	Same as SPA	Same as SPA	Same as SPA
Tennessee	Same as SPA	Substantially same as SPA	Disapproval of P/C may be overridden by majority vote of leg.
Texas[1]	N/P	"Shall not impose any duty on city" in relation to approved plats—otherwise N/P	N/P
Utah	Adoption by leg.	Same as SPA; only no P/C approval needed if in accord with M/P	Disapproval of P/C may be overriden by majority vote of leg.
Vermont	Adoption by voters	All public improvements, to be made from public funds, must be submitted to P/C	Disapproval of P/C may be overriden by majority vote of leg.
Virginia	Adoption by P/C	Same as SPA, except P/C has control only over location of utilities not subject to zoning	Council may override P/C by 2/3 vote
Washington	Adoption by leg.	N/P	N/P
West Virginia	N/P	N/P; before final action on location and design of public bldgs., public memorials, streets, parks, parkways, playgrounds, or other public areas, question must be submitted to P/C for investigation and report	
Wisconsin	Adoption by P/C	"solely to aid city P/C and the council in the performance of their duties"	P/C has 60 days to make report which may be disregarded by leg.
Wyoming[1]	N/P	N/P	N/P

[1] No planning enabling act.
[2] Special statute establishes planning commission for Fulton and DeKalb Counties.
[3] No formal provision for master plan; planning commission makes recommendations.
[4] After master plan, planning commission prepares annually coordinated and comprehensive programs of public structures and improvements; each annual plan looks ahead for 6 year period and gives order of priority of public improvements.
[5] In cities of the 1st class, if board of public works does not recommend, city cannot authorize or construct streets, public places, bridges, sewers and drains, gas, steam or water pipes, waterworks, heat or power plants, and other city buildings. This does not apply to libraries, parks, parkways, or boulevards.

RELATION OF PLANNING AND ZONING TO HOUSING POLICY AND LAW

SHIRLEY ADELSON SIEGEL*

Zoning will shortly celebrate its fortieth birthday in the United States. It has had a proud career, having gained acceptance by literally thousands of communities as an indispensable tool for assuring an orderly physical pattern of growth. Zoning is solidly established as a tool par excellence of the planners, and even the anti-planners—except for some diehards in Texas—find it an alluring insurance for the stabilization of property values.

But it is equally true that particularly since World War II zoning has been undergoing agonizing reappraisals from coast to coast. It has been tested and sometimes found wanting—even obsolete (a favorite characterization today of the early form of zoning ordinance, such as the uniform ordinance widely disseminated by the Department of Commerce in the 'twenties, still in use in many cities).

The adequacy of zoning regulations can be most appropriately tested against the needs of a modern housing program. Zoning is called upon to serve many programs such as schools, hospitals, industry, and transportation. But no program has objectives more complementary to those of zoning than does the housing and redevelopment program, here called housing for short. Zoning and housing alike are dedicated to improvement of our homes and neighborhoods. What other purpose than a housing one can you find in the traditional zoning restrictions on the intrusion of offensive uses into residential districts, in zoning controls to keep down crowding of the land, and in controls to assure light and air?[1]

The following discussion puts a spotlight on the actual relations between the housing program and the zoning ordinance.[2] It is written largely from the point of view of a city housing authority, and tries to take a clinical view of the frictions, contradictions, and non-meeting of minds that are experienced in this relationship, without, however, minimizing the many successful adjustments that have been made.

What does a housing authority want from zoning? In analyzing these needs we shall find our yardsticks for measuring the adequacy of the zoning ordinance. First, a housing program seeks protection. Like any property owner, it wants protection against inharmonious uses in its area; it particularly wants proper zoning of all the

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[1] A convenient compilation of the stated objectives and other provisions of zoning laws is provided by HOUSING AND HOME FINANCE AGENCY, OFFICE OF THE ADMINISTRATOR, DIVISION OF LAW, COMPARATIVE DIGEST OF MUNICIPAL AND COUNTY ZONING ENABLING STATUTES AS OF OCTOBER 31, 1952 (1953).

[2] I am indebted to Norman Williams, Jr., Director, Division of Planning, Department of City Planning, New York City, for his help in the planning and execution of this article, for which I am deeply grateful.

area surrounding the project. Number two is the matter of sites. The housing program wants sites that are well situated from the standpoint of its own program, and zoned for the building of multiple dwellings, which is generally the only kind of housing that a public authority can afford to build. Third, the housing program demands a reasonable freedom of design. The zoning restrictions should not hamper the freedom of the authority to design with economy, variety, and good sense. Fourth, the zoning ordinance should allow the proximity of needed community and shopping facilities. And finally, as number five, the housing authority wants workable zoning procedures and a smooth and compatible relationship with the members of the city government administering the zoning ordinance and having specifically the power to grant adjustments.

To give our study a practical footing, we devised a questionnaire which we hoped would bring out the points of comfort as well as of friction and circulated it among the housing authorities of the 50 largest cities in the United States. Replies came in from over half of these authorities,[3] providing a rich body of material on their experiences with zoning. The following discussion is to a large extent conditioned by these replies.

I

PROTECTION

There was wide acclaim in the responses to the questionnaire over the virtue of zoning in giving protection to housing projects against unfavorable uses of the surrounding property. This judgment was volunteered in answer to a catch-all question which read as follows:

In what other ways does the zoning ordinance help or hinder your housing program?

One authority after another echoed the specific comment that zoning gave protection: "protects residential use from adverse neighborhood influences"; "helps the housing program . . . same . . . benefits which accrue to other members of the community"; "helps protect our projects by controlling surrounding uses. . . . Our estates are protected by zoning in same manner and extent as private housing is protected"; "helps the program in that it tends to stabilize a residential pattern in a given area and it provides protection to appropriate residential uses."

As will be noted more fully under V, the zoning of areas adjacent to a housing project subsidized by the Federal Government and, in some jurisdictions, the state government, is negotiated as a matter of high-level policy between the public officials involved.

Notwithstanding the wide acclaim, instances of inadequate protection from zoning were cited by certain housing authorities. The question in point was worded as follows:

[3] Replies were received from: New York City, Philadelphia, Detroit, Cleveland, St. Louis, Washington, D. C., San Francisco, Milwaukee, New Orleans, Cincinnati, Seattle, Kansas City, Mo., Newark, Dallas, Denver, Oakland, Columbus, Louisville, Birmingham, St. Paul, Jersey City, Fort Worth, Akron, Miami, Dayton, Syracuse, Worcester, Hartford, and Nashville.

What problems, if any, has your program experienced because of obnoxious uses permitted in nearby commercial or industrial districts?

Unfavorable response tended to be mild, such as: "some"; "a few minor ones"; "some spot zoning near to projects for commercial uses which are a nuisance." One authority made articulate reference to the "usual established commercial or industrial uses in vicinity of slum clearance sites in central district of city." Another authority complained of obnoxious uses in the area, "principally railroads."

Of course, it is only fair to observe that where spot zoning takes place to permit the building of a housing project in an area zoned for industry, as an inevitable consequence of such abuse the housing project is surrounded by obnoxious uses which zoning may be powerless to prevent or control. Bitter examples can be given of this condition.

A specialized question about the effect of street widening, where made necessary by zoning requirements, in bringing heavy traffic through the project and thereby endangering small children netted one illustration. The housing project involved is adjacent to an industrial area, which accentuated the problem. The question referred to read as follows:

As to cities where the zoning ordinance restricts the height of buildings in relation to the width of the adjacent streets: have you had to widen streets in and/or around housing projects to fulfill this requirement? In your opinion, have wide streets retained or effected to comply with the zoning ordinance brought undesirable traffic through the housing project?

II

SITES

The problem of sites is difficult enough for a housing authority quite apart from any zoning obstacles. The following is by no means an exhaustive list of the considerations that can and often do complicate the matter of site selection for a housing program:

1. *The lack of vacant land.* This may be aggravated by topographical conditions, as in the case of a city that is surrounded by hills or water; or by tightly drawn city limits coupled with inadequate or no extraterritorial authority to build on land beyond those boundaries. When there is no vacant land the housing authority is limited to clearance areas, where it is sorely pressed by the problem of relocating families occupying the property. The chronic shortage of houses for low-income families, who are the usual inhabitants of such areas, makes relocation one of the most difficult problems in housing.

2. *Resistance to public housing.* Such resistance is often based on one or more of the following grounds: the public housing project will bring low-income families into the area; it may bring in racial or national groups that are not regarded as compatible with the groups then dominant;[3a] and public housing may increase the density of the population per acre and introduce high-rise buildings.

[3a] See CHARLES ABRAMS, FORBIDDEN NEIGHBORS (1955).

3. *Location from the standpoint of transportation, work, schools, recreational facilities, shopping, and so on.* As a public program, housing has to be sensitive to the interests of its tenants in being well located, to the problem of overtaxing or, conversely, making an inefficient use of, existing facilities, and to the public cost of building new ones.

4. *Political pressure.* The political pressure most often encountered is the pressure to allocate housing to particular political districts without regard to over-all needs or to a genuine right to priority of consideration. There are other kinds of political pressure as well. For example, in one community the site selected for public housing was the site of a notorious slum, so as to dramatize for political purposes the relationship between slum clearance and the public housing program. However, the property was in the heart of an industrial district and the selection was considered extremely unwise from a planning point of view.

5. *Housing as a buffer.* Sizable public housing projects have been used deliberately to create a buffer—sometimes between a residential and industrial area, and sometimes between different-class residential areas.

6. *Preservation of an existing integrated racial pattern.* Reference is made here to deliberate policy on the part of an authority that subscribes to the principle of racially integrated projects, but feels that it will do better to build them in borderline areas where there is already some mixed living rather than to venture into a racially pure area, where its pattern would be experimental. Such an authority will seek to use such transition or borderline areas as sites for its projects, and its racially integrated communities simply conform to the previously existing pattern. Politically the authority may have no choice if, for example, its projects are barred from the "lily-white" districts.

§ 7. *Land costs.* Comparative costs, not only of sites but also of site development, are of crucial importance to the housing authority. Some authorities report that the central sites, however desirable from many points of view, have prohibitive land values and are therefore not considered for public housing. On the other hand, another authority writes: "Economics preclude the selection of vacant land sites where utilities are lacking and must be provided for development." At least one authority is building its next housing projects on cheap marginal industrial land, which it finds the most attractive from the standpoint of cost.

The above list, while not exhaustive, may serve to suggest the many thorny problems that beset a housing authority which is looking for sites. Zoning, as the representative on earth of planning, so to speak, has the two-fold role of preventing solutions which would be poor planning, and of allowing solutions which would be good planning. A well-drafted and administered zoning ordinance might prevent the selection of a site that in the long run proves to be a poor choice for the housing program, whatever the immediate political or social objective. It may be that a great deal of the spot zoning—*i.e.*, piecemeal amendment of the zoning regulations—done for the accommodation of housing authorities, has been poor planning; housing

authorities would not be the best parties to consult on an issue of this kind and so the question has fallen outside the scope of our research. Indeed, under present circumstances, with little comprehensive planning done anywhere in the country, zoning ordinances cannot either be a very reliable index to "good" planning![4]

Whether zoning in practice allows solutions which represent good planning (which at this time we can only interpret to mean the necessities of the housing program), without putting frivolous obstacles in the way, we attempted to test in the questionnaire by three different kinds of questions on the selection of sites: first, relating to the zoning of vacant land; second, relating to the zoning of clearance sites; and third, relating to instances in which zoning has been used as a tool deliberately to deter the siting of a housing project.

A. Vacant Land

The related item in the questionnaire to housing authorities was worded as follows:

> Do you have difficulty finding vacant land sites zoned for the building types you wish to use for your projects? Is there any usual pattern observable in the zoning of outlying land, and if yes, what is it?

The suspicion that many communities in the United States have been underzoned for multiple housing, and have been putting a burden on their lower income groups by zoning their vacant land (primarily outlying vacant land) for one and two-family houses, is borne out by reading the answers to these questions. While not all housing authorities complain that they have difficulty finding vacant land sites because vacant land is not zoned for multiple housing—the only kind of housing a public program can afford to build—enough do to show that a serious problem exists. For example, one city answers affirmatively: "Yes. Extreme outer limits single family residence, followed by an inner band of two-family residence." Another says: "Yes. Usually such land is zoned for one or two-family use." Still another sizable community says: "Yes. Primarily single family residential." Another, somewhat more fully: "Yes. Although there is still considerable vacant land available in the city, it is primarily zoned as 'A' residence [that is, one-family] and requires rezoning to 'C' residence for public housing project use" (that is, a zoning district in which dwelling units housing three or more families are permitted). And the difficulty in one community is that the outlying vacant land is zoned for industrial use only.

Occasionally there is a contrary note, as follows: "Outlying vacant sites can eco-

[4] State planning laws often specifically authorize, and sometimes direct, that local planning commissions prepare a map showing the blighted and slum areas in the community and/or that they make recommendations on both the extent and the location of public housing projects. Consult HOUSING AND HOME FINANCE AGENCY, OFFICE OF THE ADMINISTRATOR, DIVISION OF LAW, COMPARATIVE DIGEST OF THE PRINCIPAL PROVISIONS OF STATE PLANNING LAWS RELATING TO HOUSING SLUM CLEARANCE AND REDEVELOPMENT AS OF JANUARY 1, 1951 (1952), and see, *e.g.*, references to California, Connecticut, District of Columbia, Georgia, Louisiana, and New York. See also, Haar, *The Master Plan: An Impermanent Constitution*, *supra* pp. 353-418, this symposium. In 26 states there was no express statutory authority of any kind for the final approval or adoption of a comprehensive plan by the local legislative body. HOUSING AND HOME FINANCE AGENCY, *op. cit. supra*, at ii.

nomically be planned to conform with density etc. requirements of existing zoning ordinance," citing a 1952 project.

A special problem arose in one city where in certain one- and two-family districts the authority may be permitted to build "a group of not more than three single family dwellings so designed as to give the appearance of a single building. . . ." The housing authority is forced into these zoning districts because of the lack of alternatives, and finds such 3-part dwellings far more costly than row houses would be. Accordingly, the authority is building more densely than it would normally build, and is being forced by the zoning regulations into an undesirable pattern of very high land coverage.

These responses on the difficulty of finding vacant land sites zoned for multiple housing call to mind the wave of cases in the law courts following World War II which upheld variances as well as spot zoning and other amendments of zoning ordinances to permit a change from one-family housing to garden apartments. Such changes were upheld in the public interest because of the housing shortage.[5] These responses also call to mind the issue squarely raised in such cases as the *Wayne Township* case in New Jersey,[6] involving the attempts of communities, usually suburban communities, to use zoning to discourage colonizing by lower income families. These objectives are often sought through minimum floor area or minimum cubic footage requirements which go beyond the necessities of decent housing standards. Such policies, compounded of school-tax worries and snobbism, are receiving some well-aimed criticism but the courts appear to be equivocating.[7]

The particular member of this family of problems with which we are immediately concerned—namely, the underzoning of a metropolitan area for multiple housing by an excessive zoning of vacant land for single or two-family dwellings—is clearly poor planning which will, until remedied, seriously hamper and distort the public housing program. It reveals a need for a thoroughgoing study of the city's population, their income and housing, resulting in a more enlightened zoning of the city's residential areas.

B. Clearance Sites

The housing authorities participating in the poll were asked:

Do you have difficulty finding clearance sites which are zoned for the building types you wish to use for your projects? If yes, please explain.

Difficulties have been encountered because of the zoning of clearance areas, complicating the housing authority's hunt for sites. A frequent complaint is that the "de-

[5] Cases cited in Comment, *The Effect of the Housing Shortage on the Single-Family Residential Zone*, 46 ILL. L. REV. 745 (1951); and HOUSING AND HOME FINANCE AGENCY, *op. cit. supra* note 1, at xii.

[6] Lionshead Lake v. Wayne Township, 10 N.J. 165, 89 A.2d 693 (1952), *writ of appeal dismissed*, 344 U.S. 919 (1953), discussed in Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954).

[7] See article by Norman Williams, Jr., in companion issue of this symposium, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317 (1955); HOUSING AND HOME FINANCE AGENCY, *op. cit. supra* note 1, at xiii.

sirable areas generally are zoned for industrial or commercial use." In another city there was a large amount of spot commercial and industrial zoning in the central city residential areas, "which makes it difficult to find small central city sites suitable for public housing." Reported elsewhere was some difficulty in finding clearance sites which permitted the height that was contemplated for a redevelopment project.

The companion question

Is there an official master plan showing areas suitable for clearance?

elicited some comment that such plans existed or were in preparation. It appeared that the map could be and was amended, however, on application of the authority—a process analogous to spot zoning which has the potentiality of destroying altogether the usefulness of the map.

C. Zoning to Deter Public Housing

Difficulties of the housing authorities in finding vacant land sites or clearance sites zoned for the building type that they wish to build are often not insuperable, as will appear from the discussion of administrative compatibility below in Section V. Sometimes zoning is far from accommodating to the housing authority, however. For example, one of the questions to the authorities read as follows:

Can you recall any instance in which zoning changes were enacted clearly to prevent or deter your program in a particular area? If yes, please explain.

We did not seriously expect to draw out any examples on a cold questionnaire, although personally convinced that zoning has been used as a barricade from time to time by the enemies of the public housing program. One housing authority did reply in the affirmative, however: "County Zoning Board zoned property for industrial use." It was explained that the city had extraterritorial powers, which it used because of the dearth of sites within city limits, and thus was obliged to deal with the unfriendly County Zoning Board. Another community cited the example of a housing project which was warmly opposed on "political and racial" grounds; "zoning was not actually the issue." The hearing on the zoning change became the occasion for protest by a thousand visitors to the city hall. But the City Council voted the zoning change over the opposition, and the project is now built and occupied.

III

DESIGN

In matters of design the early form of zoning ordinance seems to be irreconcilable with the needs of modern large-scale housing projects. Architectural progress has rendered obsolete many of the traditional zoning restrictions. We are now witnessing a trend to eliminate the old style of detailed court and yard restrictions in favor of more flexible bulk controls, a trend which is resulting in the adoption of new ordinances in most of the large cities in the country.

Dramatic illustrations of the conflict between old zoning and new housing as it is seen today in New York City are given by William Charney Vladeck in an article in the companion issue of this symposium.[8] There he considers "the difficulties of applying zoning ordinances based upon the individual lot concept to large scale developments of full blocks or superblocks, surrounded on all sides by public streets and with no actual side or rear property lines. . . ."[9] One result of these difficulties is the common practice of writing in completely fictional lot lines on the architectural plans.

Paradoxically, standards of open space are particularly high in the very housing projects which are progressively forced by outmoded zoning ordinances into the zoning districts permitting the greatest density and land coverage. Because of these standards, such large-scale developments do not, in Mr. Vladeck's words, "fill the permissible zoning envelopes."[10] But surely that is not a wholesome condition. And the draftsman of a public housing or redevelopment project is engaged in a game to develop a modern functional design within the confines of the zoning regulations, often frustrated and blocked in situations where what he is trying to accomplish is more in harmony with the original purpose of the zoning provision in question, than is the specific application written into the language of the provision and no longer meaningful today (see, for example, Mr. Vladeck's description of the experiences of the architects for Lillian Wald houses).[11]

Consider by way of illustration the provisions in the New York City ordinance for set-backs above a certain height, which give New York's buildings their characteristic pyramid-like appearance. A high-rise housing project designed with straight walls, however slender, in order to be situated near a street requires a zoning district framed for a building having wide skirts and possibly three times its density.

Another characteristic problem under the New York City ordinance became the subject for one of the questions to housing authorities, as follows:

> As to cities where the zoning ordinance requires off-street accessory parking, and the requirements are more strict in the less dense residential zoning districts: Has the parking requirement deterred otherwise desired zoning changes for housing projects?

In other words, under the New York City zoning regulations the parking requirements are directly tied to the area zoning requirements, and stiffer parking requirements follow automatically upon an improvement in standards of land coverage. The effect of this in one downtown project was to use up practically all the open land for parking facilities; although the parking facilities are fully used, many observers feel that under all the circumstances, it would have been wiser—*i.e.*, better planning—to have used the space as green open land.

The parking problem just described seems to be limited to New York City.

[8] *Large Scale Developments and One House Zoning Controls*, 20 LAW & CONTEMP. PROB. 255 (1955).
[9] *Id.* at 256.
[10] *Id.* at 257.
[11] *Id.* at 258-261.

Outside of New York, the question set forth above was met with comments that parking restrictions had caused no difficulty. Apparently many communities have the same parking requirements applicable to all zoning districts, even a requirement of one parking space per dwelling unit. A community without a 100 per cent requirement reported that it had nevertheless provided 100 per cent on-site parking for all the public housing projects. Possibly the question was not even understood outside of New York City.

Another case history on the relationship between zoning and housing design involves a city of moderate size where the housing authority had found it economical to build two-story row houses. The zoning ordinance was deliberately rewritten in 1944 to impose limitations on the public housing architects who, the planners feared, were depreciating or might depreciate neighborhood values by the design of their projects. Public housing design was put into a straitjacket. Under these limitations the maximum size of the permissible group is twelve attached houses, and there can be no more than four entrances to the housing units fronting on a street and no more than four entrances fronting on any court. The effect of these restrictions was to force a standard design in an *L* or *U* shape. The full text of the applicable provision is reproduced below in the footnote;[12] it illustrates the extreme possibility in rigidity of zoning control over design. The projects designed under these regulations naturally all look alike, and it was the despair of the housing authority architects to be thus limited in their imagination and in the possibility of developing an improved design from the standpoint of either economy, utility or beauty. Within the past year the same authority has embarked on a program of multi-story housing for economic reasons, and is now running into "impossible zoning situations" from the standpoint of design.

It is hoped that the trend to more flexible zoning restrictions, somewhat on the analogy of performance codes which are replacing the old specific building codes, will end the present difficulties. Perhaps after forty years of experience with zoning we may fairly conclude, however, that zoning is at best not a satisfactory technique for fine control of design. Its rigidity impedes progress, and its uniformity of application—an indispensable constitutional requirement—is "too coarse a screen for fine planning requirements."[13]

[12] "The group shall consist of not more than twelve apartments per floor, nor more than twelve single family dwellings. The front entrances of not more than four single family dwellings nor more than four apartments per floor shall face any street upon which the lot abuts, and no such entrance shall face a rear yard or rear court. All front entrances of such group shall abut a street, front yard, or front court; except that a front entrance may abut a side yard if all of the household unit to which such entrance is appurtenant is located no nearer the street upon which the lot abuts than the rear elevation of any part of the group having a front entrance abutting a street, front yard, or front court. No rear or service entrance, unless located below the main floor, shall face a street, front yard, or front court. All courts shall be at least 8 inches wide for each foot of court depth; provided, no court abutting the front entrance of any household unit within the group shall be less than 40 feet in width, or less than 30 feet in depth. Inclosed courts are prohibited. The number of single family dwellings, or apartment units per floor, whose front entrances do not face a street, shall not exceed four in depth from any street abutting the property."

[13] This is Charles Ascher's felicitous phrase. Mr. Ascher, incidentally, has often remarked that

IV

COMMUNITY FACILITIES

Another possible source of difficulty is the zoning of residential areas without recognition of the need for community buildings and shops close by the new housing estate. Questions to elicit experiences in these matters were framed as follows:

> What problems, if any, has your program experienced—
> (a) because of zoning restrictions on community facilities, such as health centers, in or around housing projects?
> (b) because of inadequate commercial zoning around housing projects, which creates a shortage of needed shopping facilities?

Only one authority, out of the many who were polled, reported difficulty in response to (a); the report on (b) was a resounding "None."

In this connection it is interesting to note that a city having a special zoning district for "comprehensively planned slum-clearance or low-rent housing projects sponsored by the United States government, non-profit corporations or by a municipal housing authority" permits within this district

> any other accessory use incidental and essential to a slum clearance or low-rent housing development, such as community laundries, service buildings, offices and other community facilities.

No mention is made of shopping facilities, which would probably be excluded under *ejusdem generis* principles.

V

ADMINISTRATIVE QUESTIONS

A. Frequency of Zoning Changes

The questionnaire solicited full vital statistics on each of the housing authority's projects: name, project type, approximate year opened, number of dwelling units, number of stories, building type, present zoning district, whether rezoning required and if yes, out of what district.

In a surprisingly high percentage of cases rezoning has proved necessary. This would seem to indicate that something is wrong. One may fairly assume that under a well functioning zoning ordinance such frequency of change would not take place, and so it is of some interest to examine into the possible significance of the changes. Does the zoning ordinance chronically underzone for multiple housing, with the result that almost every time a housing project is contemplated it it necessary to change the residential district? Does the housing program ride roughshod over the zoning ordinance, causing spot zoning; is politics and not planning the final arbiter? Is the explanation simply that there is a formal requirement to rezone to a special zoning district reserved for housing and redevelopment projects?

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the design of Radburn, a successful planned community in New Jersey with whose development he was associated, would not have been possible if conventionally zoned.

Out of the more than twenty-five questionnaries returned, all of which, it will be recalled, were sent to large cities, four have clearly required no rezoning for their public housing projects. One of the four cited serious zoning difficulty, however, because of the zoning of vacant land for one and two-family dwellings, making unavailable to the authority a number of desirable sites. Another three cities also have not rezoned for housing, but in each case at least one project has been left in an area zoned for industry; it is customary, even under zoning ordinances that permit any higher use, to regularize the zoning once the project is undertaken, but in these three communities that has not been done. Moreover, these three cities have not been without their zoning difficulties; in one of them a proposed zoning change was killed by popular referendum. Finally, one city rezoned because of a special zoning district created for housing projects. So much for eight of the cities.

By far a majority of the cities reported that rezoning has taken place. Of some interest is an analysis of the zoning changes which have thus been made. The number of dwelling units involved in each zoning change was tabulated, and zoning changes were divided into two principal categories so far as applicable—namely, (a) changes from one and two-family residential districts to multiple family districts, and (b) changes from industrial or commercial districts to residential. When all the tabulations were in, approximately one-half of the changes involved each of these principal categories: (a) 12,519 units in 24 projects represented rezoning for multiple housing; (b) 13,468 units in 36 projects represented rezoning for residential use. In other words, the necessity for zoning was evenly divided between the two.

As one would expect from this statistical record, the housing authorities mostly report fairly good cooperation from the organs of government that have it within their power to make zoning changes. "Utmost cooperation"; "high degree of harmony"; "excellent cooperation"; "effective cooperation." As one put it, "Regardless of zoning in effect we have always secured approval of a deviation therefrom to allow the construction of a project." Another related that the zoning regulations were "waived" for the benefit of the housing authority, following a wartime experience under which no compliance with local zoning was required because of federal involvement in the program.[14]

On the other extreme is an authority which frankly reports that it was given to understand that it was not to request any zoning changes regardless of its legal right to do so; it respected this advice.

B. Power to Rezone for Housing

It has been implicit in this entire discussion that housing and redevelopment projects are subject to local planning, zoning and building laws, and indeed, this is

[14] Local zoning regulations did not apply to housing constructed by the United States during the Second World War for war workers. HOUSING AND HOME FINANCE AGENCY, *op. cit. supra* note 1, at xvi, and cases there cited. A similar situation obtained when the Federal Public Works Administration (PWA) was building public housing in the 'thirties. When title to such housing was transferred, compliance with local zoning abruptly became necessary.

expressly provided by state law.[15] Some jurisdictions declare more fully that: "In the planning and location of any housing project, an authority shall take into consideration the relationship of the project to any larger plan or long-range program for the development of the area in which it functions."[16]

But it would be hasty to conclude that the legal relation of housing to zoning is precisely the same as that of any private building project. The facility of zoning change described in the preceding section is grounded in a statutory grant of power to "plan or replan, zone or rezone" any part of the city in connection with any housing project.[17] This grant is part of the state enabling legislation which authorizes any city to enter into "cooperation agreements" with its housing authority and the Federal Government, and otherwise to aid the housing program in any way which may be necessary or convenient.[18]

A city's express power to rezone for housing was involved in the case of *St. Stephen's Club v. Youngstown Metropolitan Housing Authority*.[19] The Club had sought to enjoin the housing authority's appropriation of its land for a federal housing project, partly on the ground that rezoning would be required. The zone was then an *"A"* residence district, limited to single family dwellings (or, with leave, two-family dwellings). A change to a *"B"* residence district would be necessary for this project, designed for 304 families in buildings housing from four to six families each. While affirming the lower court's judgment that compensation and possession should be postponed until the city had fulfilled its obligation to rezone, the Supreme Court of Ohio held that in view of the state enabling legislation and the cooperation agreement, which were standard, the necessity for rezoning would not invalidate the housing authority's appropriation proceeding.

A similar holding can be found in *Blumenschein v. Housing Authority of Pittsburgh*,[20] where the Supreme Court of Pennsylvania upheld a housing project and the concomitant cooperation agreement over objections, *inter alia*, that the presently existing zoning restrictions would be interfered with. An illuminating comment is made in the dissenting opinion[21] that it was *"manifestly unreasonable"* to select as the site for the project "one of the highest class residential developments in the City" [of Pittsburgh]. The majority of the court reaffirmed, however, that site selection is not subject to judicial review in the absence of clearly arbitrary or capricious action.

[15] *E.g.*, N.Y. PUBLIC HOUSING LAW §155 (1954); PA. STAT. ANN. tit. 35, §1556 (1937); ILL. STAT. ANN. tit. 11, §63.10 (Jones, 1939); N.J. STAT. ANN. §55:14A-11 (1940); CAL. HEALTH AND SAFETY CODE §34326 (1952).

[16] See California, New Jersey, and Pennsylvania, *supra* note 15.

[17] *E.g.*, CAL. HEALTH AND SAFETY CODE §34513(a) (1952); N.Y. PUBLIC HOUSING LAW §99 (1954); PA. STAT. ANN. tit. 35, §1550(j)(3) (1937); ILL. STAT. ANN. tit. 11, §63.74(e) (Jones, 1939); N.J. STAT. ANN. §55:14B-4(d) (1940); OHIO REV. CODE tit. 37, §3735.52 (1953).

[18] *E.g.*, in addition to state legislation referred to in note 17, *supra* (as a related subparagraph in each case), N.H. REV. LAWS c. 169, §22 (1942); W. VA. CODE OF 1949 §1409(62). Similar provisions appear in state urban redevelopment statutes, *e.g.*, W. VA. SLUM CLEARANCE AND REDEVELOPMENT AUTHORITY LAW §16, W. VA. CODE OF 1949 §1409(111) (1953 Cum. Supp.).

[19] 160 Ohio St. 194, 115 N.E.2d 385 (1953).

[20] 379 Pa. 566, 109 A.2d 331 (1954).

[21] 109 A.2d at 341.

In *Borek v. Golder*,[22] a New York case, the court relied on the express power "to . . . rezone" to defeat a taxpayer's action in so far as it challenged the right of the city of Utica to select a predominantly open site zoned for single-family dwellings as the site for a multiple housing project. The court held there was no violation of the local zoning law.[23]

C. Frustration of Zoning Change Agreed to by City Legislative Body

1. *Protest by Affected Property Owners.* The model act prepared by the Department of Commerce confers upon 20 per cent of the affected property owners the right to protest against any change in an existing zoning ordinance, whereupon the requisite vote to pass the amendment is increased to three-quarters. This provision was widely adopted, often modified in one or more particulars. Thus, in one jurisdiction a protest is effective if joined in by 10 per cent, in another, if joined in by 40 per cent. There is also wide variation in the vote required to override the protest.[24]

Legally, how does this right of protest fare in the case of public housing projects, and in particular, in the case of projects which the city is committed to carry forward because of a formal cooperation agreement with the Federal Government, for example? It is now well established that the city is bound to respect this agreement.[24a] The cooperation agreement erects into a duty to rezone, the power to rezone conferred by the state laws described in the preceding section.

First let us examine what experience the housing authorities have had with these protests to date.

Latent possibilities of head-on conflict between this right of protest and the housing program's right of way emerged squarely in a recent New York case, *Rabasco v. Town of Greenburgh*.[25] The intermediate appellate court of the state held invalid a purported amendment of the zoning ordinance for a public housing project, because the amendment failed to obtain a three-quarters vote of the entire town board after there had been a written protest by 20 per cent of the affected property owners, residents of the areas proposed to be rezoned or the areas adjacent or opposite. Two members of the court dissented, taking the view that only a majority vote was required. The dissenting judges argued as a matter of statutory construction that in the absence of specific language stating that the power of a majority of the local legislative body to approve a plan for a housing project shall not be sufficient if 20 per cent of the affected property owners object, such a specific limitation cannot be imposed on the broad housing powers conferred by the state Constitution and the Public Housing Law. "It would appear," they contended,[26] "that the Legislature

[22] 74 N.Y.S.2d 675 (Sup. Ct. 1947).

[23] The court's opinion also noted (at p. 696): "The acute need of housing and the trend toward multiple units is so generally accepted that a change of zoning to permit such developments is not sufficient to establish illegality." *Cf.* note 5 *supra.*

[24] Consult HOUSING AND HOME FINANCE AGENCY, *op. cit. supra* note 1.

[24a] Housing Authority v. City of Los Angeles, 38 Cal.2d 853, 243 P.2d 515 (1952), *infra* note 33.

[25] 137 N.Y.S.2d 802 (2d Dep't 1955).

[26] *Id.* at 806.

has substituted the qualified approval or disapproval by a planning board for the protest of twenty per cent of the owners as the basis for requiring more than a majority vote. . . ." In this case the approval of the planning board was unqualified, except in so far as it raised the question of the adequacy of the vote on the zoning amendment.

As an alternative to the protest provision, at least one state requires that no zoning change is effective without the written consent of two-thirds of the affected property owners.[27] Replies to the questionnaire which was circulated among housing authorities disclosed that this requirement had been responsible in one city alone for preventing two housing projects proposed to be built on vacant land and requiring a change of zoning district from *"A"* to *"C."*

So the score now stands on the experience of housing authorities with the protest and consent provisions in zoning ordinances—a limited experience, all of it unfavorable. It is significant that such provisions have in some contexts been held inoperative by the courts in the public interest. The United States Supreme Court in a ringing opinion struck down a consent provision which was preventing the construction of a spacious old people's home in a single family residential district: "They [the adjacent property owners] are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily. . . . The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment."[28] And in New York, in holding unconstitutional under both the state and federal constitutions a provision requiring the consent of 80 per cent of the adjacent property owners to the erection of a school building in a residential district, the highest state court said: ". . . we are not dealing with billboards or garages or other offensive uses in connection with which consent provisions may be proper. . . ."[28a] How ironic that public housing has so far had the fate of the offensive uses rather than the proper uses, and also how inconsistent with the series of constitutional tests certifying to its public purposes. Subjection of the public housing program to the hazards of the protest and consent provisions of local zoning regulations is anomalous and, it is to be hoped, short-lived.

2. *Referendum.* In some jurisdictions a zoning change can be defeated by a popular referendum. There was a striking example in 1953 of how this could frustrate a zoning change needed for a housing project. As reported in a reply to the questionnaire, the referendum was held after the City Council had changed the zoning of a proposed housing site. "Zoning change was defeated, thus preventing construction of project."

On the analogy of the reasoning that provisions giving a per cent of the affected property owners a right of protest have no application to housing and redevelopment projects, it is arguable that referendum privileges also are inapplicable. In

[27] Minnesota. South Dakota authorizes a requirement for 60 per cent consent *in addition* to making zoning amendments subject to referendum and protest.

[28] Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928).

[28a] Concordia Collegiate Institute v. Miller, 301 N.Y. 189, 195, 93 N.E.2d 632, 635 (1950).

fact this has been squarely adjudicated and so held in California. In *Lockhart v. City of Bakersfield,*[29] the intermediate appellate court of California took the view that the referendum provisions were inapposite and could not abridge the power to zone and rezone for housing projects, which power had independent derivation from state law.[30] The court was aided in this conclusion by a provision in the housing authorities law that no law concerning the acquisition of property by other public bodies is applicable to housing authorities unless the legislature so states.[31]

The facts of the *Lockhart* case were briefly as follows: In accordance with the provisions of a cooperation agreement, the city of Bakersfield rezoned an area from a one-family to a two-family residence district in order to make feasible a duplex public housing development. Thereafter a referendum petition to submit this rezoning ordinance to the voters was filed. The city, nevertheless, went ahead and expressly approved the site for the project, in a resolution to take effect immediately. At that time the election date was set for some three months later. This suit was then brought, unsuccessfully, to enjoin the allegedly unauthorized rezoning.[32]

3. *Successor Public Body or Different City Department.* Under recent case law it would seem that there is no longer room for doubt that a successor city legislative body is bound by the action of its predecessor in entering into a cooperation agreement for the planning and construction of public housing projects.[33] It will be recalled that the cooperation agreement specifically commits the city to plan and replan, zone and rezone, as may be necessary and convenient, both the housing project site and the surrounding area. But far more difficult than the problem of binding a successor council is the problem that the council may not be the repository of power to make zoning changes for the community.

In addition to its dependence on another agency for the making of necessary zoning changes, the city council or other body which has authorized execution of the cooperation agreement may find it then has to satisfy the planning commission as to conformity with the master plan. In *Drake v. City of Los Angeles,*[34] a taxpayer sought to enjoin the progress of the city's public housing program on the grounds, *inter alia,* that the matter of the cooperation agreement had not first been submitted to the City Planning Commission for approval and recommendation in relation to the master plan, and that none of the sites had been approved by the City Planning

[29] 267 P.2d 871 (1954).

[30] The court leaned heavily on the rationale of Housing Authority v. City of Los Angeles, 38 Cal.2d 853, 243 P.2d 515 (1952), *infra* note 33.

[31] CAL. HEALTH AND SAFETY CODE §34320 (1952).

[32] *Cf.* State *ex rel.* Great Falls Housing Authority v. City of Great Falls, 110 Mont. 318, 100 P.2d 915 (1940), raising an argumentative point involving a referendum on zoning. There a mandamus writ issued directing the city to comply with its agreement to rezone certain blocks and change the street pattern. Among other things, the court considered whether the referendum law was abridged by the provisions of the cooperation agreement, and concluded that it was not.

[33] Housing Authority v. City of Los Angeles, 38 Cal.2d 853, 243 P.2d 515 (1952), *cert. denied,* 344 U.S. 836 (1952). *Cf.* State *ex rel.* Helena Housing Authority v. City Council of City of Helena, 125 Mont. 592, 242 P.2d 250 (1952).

[34] 38 Cal.2d 872, 243 P.2d 525 (1952).

has substituted the qualified approval or disapproval by a planning board for the protest of twenty per cent of the owners as the basis for requiring more than a majority vote. . . ." In this case the approval of the planning board was unqualified, except in so far as it raised the question of the adequacy of the vote on the zoning amendment.

As an alternative to the protest provision, at least one state requires that no zoning change is effective without the written consent of two-thirds of the affected property owners.[27] Replies to the questionnaire which was circulated among housing authorities disclosed that this requirement had been responsible in one city alone for preventing two housing projects proposed to be built on vacant land and requiring a change of zoning district from *"A"* to *"C."*

So the score now stands on the experience of housing authorities with the protest and consent provisions in zoning ordinances—a limited experience, all of it unfavorable. It is significant that such provisions have in some contexts been held inoperative by the courts in the public interest. The United States Supreme Court in a ringing opinion struck down a consent provision which was preventing the construction of a spacious old people's home in a single family residential district: "They [the adjacent property owners] are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily. . . . The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment."[28] And in New York, in holding unconstitutional under both the state and federal constitutions a provision requiring the consent of 80 per cent of the adjacent property owners to the erection of a school building in a residential district, the highest state court said: ". . . we are not dealing with billboards or garages or other offensive uses in connection with which consent provisions may be proper. . . ."[28a] How ironic that public housing has so far had the fate of the offensive uses rather than the proper uses, and also how inconsistent with the series of constitutional tests certifying to its public purposes. Subjection of the public housing program to the hazards of the protest and consent provisions of local zoning regulations is anomalous and, it is to be hoped, short-lived.

2. *Referendum.* In some jurisdictions a zoning change can be defeated by a popular referendum. There was a striking example in 1953 of how this could frustrate a zoning change needed for a housing project. As reported in a reply to the questionnaire, the referendum was held after the City Council had changed the zoning of a proposed housing site. "Zoning change was defeated, thus preventing construction of project."

On the analogy of the reasoning that provisions giving a per cent of the affected property owners a right of protest have no application to housing and redevelopment projects, it is arguable that referendum privileges also are inapplicable. In

[27] Minnesota. South Dakota authorizes a requirement for 60 per cent consent *in addition* to making zoning amendments subject to referendum and protest.

[28] Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928).

[28a] Concordia Collegiate Institute v. Miller, 301 N.Y. 189, 195, 93 N.E.2d 632, 635 (1950).

fact this has been squarely adjudicated and so held in California. In *Lockhart v. City of Bakersfield,*[29] the intermediate appellate court of California took the view that the referendum provisions were inapposite and could not abridge the power to zone and rezone for housing projects, which power had independent derivation from state law.[30] The court was aided in this conclusion by a provision in the housing authorities law that no law concerning the acquisition of property by other public bodies is applicable to housing authorities unless the legislature so states.[31]

The facts of the *Lockhart* case were briefly as follows: In accordance with the provisions of a cooperation agreement, the city of Bakersfield rezoned an area from a one-family to a two-family residence district in order to make feasible a duplex public housing development. Thereafter a referendum petition to submit this rezoning ordinance to the voters was filed. The city, nevertheless, went ahead and expressly approved the site for the project, in a resolution to take effect immediately. At that time the election date was set for some three months later. This suit was then brought, unsuccessfully, to enjoin the allegedly unauthorized rezoning.[32]

3. *Successor Public Body or Different City Department.* Under recent case law it would seem that there is no longer room for doubt that a successor city legislative body is bound by the action of its predecessor in entering into a cooperation agreement for the planning and construction of public housing projects.[33] It will be recalled that the cooperation agreement specifically commits the city to plan and replan, zone and rezone, as may be necessary and convenient, both the housing project site and the surrounding area. But far more difficult than the problem of binding a successor council is the problem that the council may not be the repository of power to make zoning changes for the community.

In addition to its dependence on another agency for the making of necessary zoning changes, the city council or other body which has authorized execution of the cooperation agreement may find it then has to satisfy the planning commission as to conformity with the master plan. In *Drake v. City of Los Angeles,*[34] a taxpayer sought to enjoin the progress of the city's public housing program on the grounds, *inter alia,* that the matter of the cooperation agreement had not first been submitted to the City Planning Commission for approval and recommendation in relation to the master plan, and that none of the sites had been approved by the City Planning

[29] 267 P.2d 871 (1954).

[30] The court leaned heavily on the rationale of Housing Authority v. City of Los Angeles, 38 Cal.2d 853, 243 P.2d 515 (1952), *infra* note 33.

[31] CAL. HEALTH AND SAFETY CODE §34320 (1952).

[32] *Cf.* State *ex rel.* Great Falls Housing Authority v. City of Great Falls, 110 Mont. 318, 100 P.2d 915 (1940), raising an argumentative point involving a referendum on zoning. There a mandamus writ issued directing the city to comply with its agreement to rezone certain blocks and change the street pattern. Among other things, the court considered whether the referendum law was abridged by the provisions of the cooperation agreement, and concluded that it was not.

[33] Housing Authority v. City of Los Angeles, 38 Cal.2d 853, 243 P.2d 515 (1952), *cert. denied,* 344 U.S. 836 (1952). *Cf.* State *ex rel.* Helena Housing Authority v. City Council of City of Helena, 125 Mont. 592, 242 P.2d 250 (1952).

[34] 38 Cal.2d 872, 243 P.2d 525 (1952).

Commission. An injunction was denied on the basis of a considered analysis of the related statutes which concluded that the requirements in question were not a condition precedent to the action of the council. Incidentally, the Supreme Court of California pointed out that at the time the housing project was before the City Council for general authority to execute a cooperation agreement, specific plans for the project were not yet formulated; submission to the planning commission was scheduled to come later.

Whether or not rezoning is required at the time the project is planned and constructed, zoning problems may lie in wait for the housing authority in connection with the zoning of the surrounding area. Here again there is an acute question how firmly the city agency executing or authorizing the execution of the cooperation agreement can control the local body having jurisdiction over variances, and over zoning amendments. New York State provides an excellent case in point. A provision in the Public Housing Law expressly requires as a condition precedent to receiving a state loan for a project that "the municipality . . . has enacted or will enact zoning regulations or other restrictions adequately protecting the area or areas . . . against future uses likely to depreciate unduly the value of such project."[35] The State Housing Commissioner conscientiously exacts such conditions from local housing authorities, and negotiations on these points are detailed, usually call for compliance within six months, and become a part of the loan agreement. The Commissioner can withhold financial aid in the event of a breach.

Now, in New York City, for example, it is the Board of Estimate which signs the loan agreement with the State, and the Board of Standards and Appeals which has the authority to grant zoning changes. There appears to be some misgiving on the part of the city as to the extent to which it can or should bind the Board of Standards and Appeals, apparently in perpetuity, not to grant any zoning variances inconsistent with the Board of Estimate's agreement with the State Housing Commissioner. Apparently inspired by the office of the State Commissioner, a provision was added to the Public Housing Law in 1954, partly clarifying this situation, to the effect that all zoning regulations or other restrictions enacted by the municipality to protect adequately the area of a project must be maintained thereafter without variance, unless at least ten days' prior written notice is given to the housing authority and the government providing financial assistance of a public hearing on the proposed change.[36]

CONCLUSION AND SUMMARY

1. Zoning has fulfilled its promise in protecting the area of a housing project against future depreciating uses of the surrounding area.

2. Zoning mirrors the lack of comprehensive planning in the community. This has had consequences in the common practice of spot zoning, the common under-

[35] N.Y. PUBLIC HOUSING LAW §71(1)(b) (Cum. Supp. 1954).
[36] Sec. 155, as amended, L. 1954, c. 130.

zoning for multi-family housing, and the occasional perversion of zoning to checkmate public housing.

3. Zoning has proved obsolete in many communities from the standpoint of architectural design of large-scale housing projects, and a reform movement is under way to correct this. Zoning has shackled public housing design in other ways as well and has run up costs.

4. Zoning has occasionally thwarted the establishment of needed community facilities in close proximity to a housing estate.

5. Zoning has, over-all, a good record of cooperation with housing on the administrative level. There are germs of conflict, which erupt from time to time, between the traditional repositories of local zoning policy and the overriding state public policy to authorize zoning changes for the necessity and convenience of public housing projects.

CONSERVATION OF EXISTING HOUSING

WILLIAM L. SLAYTON*

Conservation as a term in the field of city development is not yet clearly defined, but its evolutionary stage is such that one can predict with some certainty what it will be accepted as meaning within a few years. Within the past few years, it has been used to describe many municipal activities and programs, and it has been used synonymously with many other terms in the rapidly developing field covering governmental action to improve housing conditions. This semantic confusion has hindered communication among those groups interested in greater municipal concern over housing conditions and has frequently created antagonisms and overemphasized differences. Although this semantic confusion is unfortunate, it is understandable; the major groups that have evidenced interest in the field—including private business groups, planners, housers, and municipal officials—are quite divergent. Frames of reference differ among such groups as do their basic aims and goals. Each group tends to develop its own special terms—terms which tend to have esoteric meanings within the group. Communication among the groups is not great. In fact, several of the groups take diametrically opposed positions on major housing questions. This opposition tends to create suspicion of the other's aims and to preclude, or at least strongly discourage, agreement among the groups on aims, means, and terms.

But now that there is a definition of "conservation" in the Housing Act of 1954 (*infra* note 3; §311(c), 42 U.S.C.A. §1460(c) (Supp. 1954)) and since cities are beginning to increase their housing improvement activities, these various terms are beginning to acquire generally accepted meanings. The use of a single term to define both a program and a particular action is not as prevalent as it once was, and one finds greater precision in their application. But some confusion still exists, and since this symposium on planning law has several articles in which these terms are used, it is well to define them carefully.

Conservation is a program to maintain the economic and social values of a neighborhood and, where desirable, to improve those values. Conservation accomplishes these aims by maintaining and improving the physical standards of the neighborhood —both private and public. Its aim is to maintain and improve the quality of the area's housing and public improvements. Its approach is neighborhood improvement —not just the improvement of a single structure—and it is concerned with basically sound neighborhoods—neighborhoods that are worth conserving. In accomplishing

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these aims, conservation may employ many tools—perhaps all of the tools defined below that have to do with improving housing and neighborhood conditions.

Of major importance in this definition is the neighborhood approach. Although it is possible to conserve a single structure or a group of structures, effective and lasting conservation is undertaken on a neighborhood, or planning area, basis. A prerequisite for a conservation program, therefore, is the existence of a plan for the neighborhood.

Thus the aim of conservation—*viz.*, the achievement of a sound, well planned neighborhood—is quite similar to redevelopment, but of course the means differ considerably. Under conservation, preservation of existing structures and basic patterns is the means of accomplishing the end; under redevelopment the means is demolition and rebuilding. Under conservation, the neighborhood or area is basically sound; under redevelopment the neighborhood or area is basically bad—it is not worth preserving. Redevelopment is concerned with areas quite low in the scale of existing values; conservation is concerned with areas considerably higher in this scale of values. Generally there is a gap between the two; that is, there are areas neither high enough nor low enough in the scale to be susceptible to either kind of treatment.

The demolition of structures within a conservation area, however, is one of the necessary tools in a conservation program. It may be necessary to employ redevelopment powers to achieve this demolition, but for purposes of definition, this is not strictly redevelopment. Demolition and rebuilding on relatively few scattered parcels does not constitute redevelopment nor does the preservation of relatively few scattered structures in an area otherwise to be demolished constitute conservation.

"Housing law enforcement" follows "conservation" and "redevelopment" as the third term in this glossary. When this term is used, there is little confusion as to its meaning. The confusion arises from using other terms, such as "conservation" and "rehabilitation," as synonymous with "housing law enforcement." Housing law enforcement, or sometimes just "code enforcement," is a self defining term. It is the enforcement of municipal codes and ordinances that apply to housing. Such codes and ordinances include the building code, zoning ordinance, electrical code, fire code, plumbing code, etc. In addition it includes what many cities call a "housing code"—a code of minimum standards for existing housing. It is the enforcement of this minimum housing standards code that is in the minds of most when the term "housing law enforcement" is used.

Housing law enforcement is a tool—not a program. It is frequently thought of as a program in itself because it is often (and rightly so) applied on an area basis to bring the standards of all housing in one area up to the prescribed minimum. The "Baltimore Plan" initially consisted of a housing law enforcement program on an area basis. The publicity given the "Baltimore Plan" has done much to alert cities to the importance of adopting minimum standards for existing housing and of

enforcing such standards on an area basis. It is important to understand, however, that housing law enforcement on an area basis is not conservation although housing law enforcement may be a tool employed in a conservation program. The inherent limitations of housing law enforcement prevent it from achieving by itself the aims of conservation, and these limitations will be discussed later on.

"Rehabilitation" is the fourth term. It is perhaps the most widely misused term of all, being employed to mean conservation, redevelopment, and housing law enforcement as well as its more precise meaning—*viz.*, the remodeling or renovation of an existing structure. Rehabilitation obviously results, although on a somewhat minor scale, from housing law enforcement; and this is the reason the terms have often been used interchangeably. Also rehabilitation is essential in a conservation program, and this too accounts for equating the two terms. Rehabilitation, however, has also been used to mean redevelopment; for in the early days of redevelopment, the two terms were often used to mean the same thing. Lately, the term "'rehabilitation" has been used but infrequently to mean redevelopment.

Urban renewal is the most recent term in the glossary. It achieved its present prominence quite rapidly. Its first real use came from Miles Colean's book, *Renewing Our Cities*.[1] The term was picked up by, and gained further ascendancy from, the report of The President's Advisory Committee on Government Housing Policies and Programs.[2] It was then incorporated in the Housing Act of 1954.[3] Under the Housing Act of 1954 (§311(c), 42 U.S.C.A. §1460(c) (Supp. 1954)), the term "urban renewal project" was defined to include "undertakings and activities . . . for the elimination and for the prevention of the development or spread of slums and blight" and to involve "slum clearance and redevelopment . . . or rehabilitation or conservation . . . or any combination or part thereof. . . ." Although the term had to be defined rather strictly in the legislation in order to limit the activities for which the Federal Government would provide financial assistance, the concept is quite clear. It is the broad, all inclusive term covering all the city's activities to eliminate and prevent the spread of slums and blight. Thus it includes all the terms already mentioned.

It should be pointed out that although public housing is not legally part of urban renewal under the Housing Act of 1954, it is clearly a part of the urban renewal concept. It improves housing conditions by providing housing for low income families and eliminating through various methods a comparable number of substandard structures.

Urban renewal, then, is the over-all term, embracing the programs of redevelopment, conservation, and public housing and the use of the tools of rehabilitation and housing law enforcement. Urban renewal also presupposes a program of general

[1] MILES L. COLEAN, RENEWING OUR CITIES (1953).

[2] PRESIDENT'S ADVISORY COMMITTEE ON GOVERNMENT HOUSING POLICIES AND PROGRAMS, RECOMMENDATIONS ON GOVERNMENT HOUSING POLICIES AND PROGRAMS (1953).

[3] Title I, Housing Act of 1949, as amended by Title III, Housing Act of 1954, 63 STAT. 414 (1949), as amended, 68 STAT. 622 (1954), 42 U.S.C.A. §1450 *et seq.* (Supp. 1954).

city planning; for without planning on a city-wide basis as well as a neighborhood or area basis, each of these programs and activities becomes an isolated, unrelated project. Thus, urban renewal is the city's program to eliminate and prevent slums and blight.

This somewhat lengthy discussion of terms is essential to indicate how these terms will be used in this paper and to place conservation in its proper perspective. But before getting into methods of carrying out a conservation program and the problems raised in such an undertaking, it would seem wise to define conservation further in terms of (1) the kinds of areas where conservation is and is not the appropriate program and (2) a realistic appraisal of its potential.

CONSERVATION AREAS

In discussing areas suitable for conservation, it is necessary to create a "model"—*i.e.*, an area which contains all those elements that make it suitable for the kind of program here described. Probably no such "model" conservation area exists in any city, for in practice one finds areas to be mixtures of many things which require the use of more than one program to achieve urban renewal objectives. But nevertheless, where most of these conservation elements are present, the area can be treated primarily by a conservation program. Classifications are useful to indicate the major kind of treatment required, but it should always be recognized that nearly every area of any size will require more than one remedial program.[4] But for purposes of describing the kinds of areas that are worth conserving, we will assume the fiction of homogeneity.

Time is the first and major element in selecting areas for conservation. A conservation program is aimed at prolonging the economic and social life of an area for a good many years—twenty-five, or even more. It is not a hold-the-line program—a program aimed at maintaining the condition of the area at a relatively low level until the community amasses the resources to give it a drastic remedial treatment. There are such areas—areas that for various reasons should be cleared but which cannot be cleared and redeveloped without governmental assistance and which rate a rather low priority for treatment. Major investment in such areas would be foolish, but yet conditions cannot be allowed to threaten the health or safety of the inhabitants. In such an area, conservation would be unwise; but housing law enforcement to maintain minimum standards would be essential. Thus how long the community wishes to continue the use and pattern of an area is an essential criterion in determining whether an area should be conserved.

Another basic criterion is use. If an area is residential in character and if the city's land use plan shows the area for non-residential use, then conservation of the residential use would ignore the city's planning objective. Such an area creates a problem for the community, but conservation is certainly not the answer.

[4] For an excellent example of the classification of areas on the basis of the major kind of treatment required, see BROOME COUNTY PLANNING BOARD, A FIGHT-BLIGHT PLAN FOR BINGHAMTON, NEW YORK, GENERAL PLAN REPORT NO. 5 (1953).

Land pattern is a third criterion. Hindsight is a wonderful attribute. It enables us to criticize our predecessors' lack of vision in laying out too narrow streets, too small lots, too many streets, etc. But it also means that we should not make the same error by preserving their mistakes. If the land pattern of an area is obsolete and basically bad, then the error is compounded if today we take steps to preserve it. The land pattern need not conform to the highest of present day standards to make it conservable, but certainly it must be acceptable and usable under present day conditions before it warrants investment in its continuance.

A fourth criterion is density. This is not so much the over-all density of the area, for a conservation program can do much to remedy such density deficiencies. This density is really land coverage. If the structures are so placed upon their parcels and are of such a size as to create a high density—a density in excess of acceptable standards—then conservation would merely tend to preserve this undesirable density. It might even increase the density because of the conversion of large units into smaller ones.

A fifth criterion is the economics of conserving the area. This factor will become more evident in discussing the elements of the conservation program, but here it should be pointed out that even though all the other factors are favorable, it may be financially infeasible to conserve the area—there may be no market for the structures in the area if it is conserved.

The sixth and last criterion is the obvious one—condition of the structures. If the structures in the area are of such a design or in such a condition that they do not warrant additional investment and are not worth conserving, then the area is not a suitable conservation area.

Emphasis has been placed upon negative criteria purposely. Too often conservation is suggested as a means of improving neighborhoods that are basically unsound. The emphasis is solely that of improving the condition of the structures themselves with little regard to the desirable use of the area, its land pattern, etc. Though the condition of the structures in the area is a major factor, it is not, by far, the only one.

Although these criteria have been stated negatively, they obviously may be stated positively as well, and when so stated constitute the criteria for selecting areas suitable for conservation.

CONSERVATION POTENTIAL

The second topic that requires some discussion before getting into the techniques and problems of conservation is its potential. Here too it is necessary to take a somewhat negative approach in order to discredit the exaggerated claims that have been made for it. Conservation is often looked upon as a means of raising the economic level of an area. It is evident that this is possible; Georgetown in Washington, D. C., is the classic example. But areas such as these are the exception rather than the rule. They become socially desirable areas and considerable sums are invested in improving the structures. Only a very few of these older neighborhoods can be so

transformed. The income stratification of the population will not be altered because of conservation activities; each economic group will have to live somewhere, and all areas cannot be transformed so that they will attract those with higher incomes.

It is unfortunate that emphasis is sometimes placed upon major upgrading in conservation areas, for it distorts the basic idea of conservation—*viz.*, the preservation and improvement of the area so that it may serve a longer, more useful, and more desirable economic life. Improvement is to remedy existing deficiencies and to remove, partially at least, some of the obsolescence that is bound to be present. As newer areas are developed, they will generally attract the higher income groups from the older areas, and it is almost impossible to maintain an area for the same economic groups throughout its life. The purpose of conservation is to prevent deterioration of the area when this movement occurs by providing some of the elements (other than newness of structures) that make the new areas more attractive. Conservation is aimed at preventing such areas from becoming blighted.

A Conservation Program

The purpose of a conservation program is to remove those deficiencies that have made the area less desirable and to provide those amenities that make other areas more attractive. At the outset, it must be recognized that this is a relative goal, for age itself is a deficiency that cannot be overcome by a conservation program. Obsolescence takes place in the best of structures, and short of almost complete rebuilding, it cannot be remedied by conservation.

On the positive side, it should be noted that these older areas that are worth conserving have some attributes that make them more desirable that newer areas. Large shade trees, larger houses, less travel time to work, etc., are usual attributes of such areas. The purpose of conservation is to capitalize on these attributes and to provide as many as possible of the amenities present in the newer areas.

Neighborhood Plan

A major deficiency in these older areas worth conserving (they will be called conservation areas from here on) is the layout of the area—the neighborhood plan. Too many streets and a bad traffic pattern in many cases have caused the decline of the area. With subdivision regulations, the newer areas provide a much better traffic pattern and fewer streets. Curvilinear design has supplanted the gridiron pattern. Not much can be done with a gridiron pattern to change it into a curvilinear pattern, but something can be done to improve traffic conditions and remove some of the streets. The closing of some streets will force traffic to follow desired routes, and the land thus obtained can be used for small parks and play areas. Or it is possible to create pedestrian ways where streets once existed, the resulting green areas doing much to make the area more desirable.

Community Facilities

The neighborhood plan must also include provision for community facilities.

It is not just a bad street pattern that has caused the relative decline of the area but the lack of community facilities as well. Land for parks and playgrounds is expensive in closer-in areas, and the setting aside of land for such purposes occurs much more frequently now than it did in the time these conservation areas were developed. Consequently, these conservation areas are marked by an absence of parks and playgrounds; the schools are usually aging and fail to provide the physical amenities of the newer schools in outlying areas. Children must cross major streets to get to school and there often is little or no land around the school for play purposes. Street lighting could be improved. Municipal services in general tend to become slipshod, reflecting the municipality's and residents' recognition of the area's declining character.

In short, the deficiencies in services and facilities supplied by the municipality are in part responsible for the area's declining character. The new plan for the conservation area, therefore, should include those community facilities necessary to bring it up to a desirable standard. Public expenditures in such areas may be sizable and should constitute a fair share of the capital improvement program. In short, the municipality should anticipate a major re-doing of community facilities in such areas.

Demolition of Unsound Structures

In these conservation areas, there are likely to be at least a few structures that are not worth rehabilitating. These are essentially slum structures, and their presence does much to accelerate the area's deterioration. Removing them can likewise do much to stimulate the area's improvement. The municipality may use its power of eminent domain in connection with providing public improvements to acquire such structures—replacing them with parks, playgrounds, new schools, etc.—but this forces a neighborhood plan in which the location of these community facilities is dictated by the location of undesirable structures. Where the two can be made to coincide without detriment to the neighborhood plan, then a double purpose is achieved.

Removal of Adverse Uses

Many of these conservation areas were developed prior to the adoption of a zoning ordinance, and as a consequence, one finds scattered uses that do much to make the area less desirable. The classic example, of course, is the junk yard. A junk yard is never a thing of beauty; and when in the midst of a residential area, it naturally exerts an adverse effect. Rooming houses, improperly located taverns, business sandwiched between houses—these are further examples of improper land use that tend to detract from the area. Removing such adverse uses is difficult, unless, of course, they can be replaced by the new community facilities planned for the area, but their removal is important if the area is to be conserved.

Rehabilitation of Structures

Improvement of the structures in a conservation area is really the heart of the conservation program. This is the aim of municipal activity in installing community facilities, replanning the area, removing the adverse uses, and demolishing the unsound structures. These activities are all aimed at making the area a more desirable residential area and encouraging the maintenance and improvement of the structures. In reporting out the Housing Act of 1954, the Senate Banking and Currency Committee made it quite clear that a substantial improvement in housing conditions was the intent of the financial aid offered and that cities would not receive financial aid for community facilities unless such improvement resulted.[5]

Rehabilitation will generally take the form of modernization in such areas. The remodeling of kitchens and bathrooms, the removal of partitions, the installation of new heating plants, the improvement of exterior appearance—these are the kinds of rehabilitation activity one would expect in conservation areas. In addition, one might expect some conversions, altering large structures into smaller units. In conservation areas, the structures for the most part are basically sound—the defects are essentially those attributable to obsolescence rather than to major neglect. There will, of course, be some rehabilitation to correct inadequate maintenance—painting, new siding, etc.—but the major rehabilitation work will be primarily modernization to make the units more livable.

It is one thing to say that this kind of rehabilitation is what is necessary in conservation areas and another thing to bring it about. This is the major problem in any conservation program and how to achieve the kind of rehabilitation desired has not really been answered.

New Construction

It has long been considered inadvisable to build in older areas where the neighboring houses are well along in years. But if conservation is to improve an area, it must do something to encourage new construction. As Miles Colean points out in his book,[6] the problem is to obtain renewal—the gradual replacement of the structures in the area. The aim of conservation is to encourage both rehabilitation and new construcion so that there will be a constant renewing of the area.

Housing Law Enforcement

Housing law enforcement standards are, by definition, minimum. They fall short of the standards that should be set for conservation areas. Housing law enforcement does improve structures, but it does not result in the kind of modernization and improvement contemplated under conservation.

At the same time, housing law enforcement is of value in a conservation area. There is always the problem of persuading the recalcitrant owner to bring his property up to the standards set for the conservation area. It is difficult under existing

[5] HOUSING ACT OF 1954, REPORT FROM THE COMMITTEE ON BANKING AND CURRENCY, SEN. REP. NO. 1472, 83d Cong., 28d Sess. 35-36 (1954).

[6] RENEWING OUR CITIES (1953).

law to force him to cooperate. But one can force such an owner to bring his property up to the standards of the housing code, even though those standards are less than desired. It can be used to achieve some improvement.

Another useful function of housing law enforcement in a conservation program is the enforcement of occupancy provisions—provisions limiting the number of families that may occupy a given structure. A major cause of area deterioration is overcrowding—both of a dwelling unit and of a structure. It is evidence of too intensive a use and consequently of a probable milking of the structure by the owner—evidence of little or no interest in maintaining the structure. Law enforcement of this provision, therefore, is particularly useful in a conservation area.

Generally, however, the condition of the structures in conservation areas is better than that of the standards in the housing code. Housing law enforcement per se would do little to improve housing conditions in the area.

Relocation

The last element in a conservation program is relocation. People will be displaced by many of the actions in a conservation program—demolition, enforcement of occupancy provisions, installation of community facilities, removal of adverse uses, and rehabilitation. Community opinion will not generally accept the eviction of families if such families have no place to go. Consequently, a conservation program must at least consider the rehousing problem that will be generated.

The extent to which the community will and can assume responsibility for rehousing these displaced families will vary considerably. But as a minimum, a city can be expected to show some concern for these families and to provide some administrative device for assisting them in locating new quarters. Some cities may wish to go farther by providing financial assistance and, as under the urban redevelopment program, insisting that the quarters to which such families move meet the locality's minimum standards. Evidence would indicate a growing acceptance of public responsibility for assisting families displaced by government action.

These are the elements in a conservation program. A neighborhood plan, conforming to the master plan and providing for the installation of community facilities, demolition of unsound structures, removal of adverse uses, structural rehabilitation, new construction, housing law enforcement, and relocation. If all of these elements could be achieved, the result would be the rejuvenation of the area. The problem is how to achieve them.

LEGAL PROBLEMS IN CONSERVATION

Conservation presents municipalities with a new set of legal problems. In essence it is the problem of the extent to which private property rights have to give way to the public good as established by the municipality; for all of these problems go directly to the question of the authority of the municipality in dealing with private property.

Under urban redevelopment legislation, the acquisition of slum property by a municipality and its disposition for private use is considered a public use or purpose within constitutional requirements. The public purpose is the removal of the slum because it endangers the health and welfare of the city's residents. It is also the carrying out of a plan that prevents future slums. In addition, under public housing legislation, the municipality has the authority to acquire either vacant or slum land for the purpose of erecting housing for low income families. The public purpose is the eventual destruction of the slums and the provision of housing for low income families. Also, under housing law enforcement, the municipality is exercising its police power in forcing owners and tenants to maintain their property in a safe and healthful condition, for to do otherwise would endanger the health and welfare of the inhabitants.

The constitutionality of these three actions has been well established. Urban redevelopment and public housing legislation have been upheld in numerous states, and the enforcement of minimum standards goes way back to the removal of nuisances. The courts have held that these actions are proper functions of the municipality.

Of the elements listed in the previous section, the first two raise no legal problems. Preparing a plan for the neighborhood is a standard municipal function and so is the installation of community facilities. The latter raises a problem of financing but certainly no legal problems. But all of the other elements do raise some kind of legal difficulty. Conservation raises new questions—questions that involve a greater encroachment on property rights—and we are now in the position of exploring possible solutions and determining the extent to which the courts feel it is proper for municipalities to go in attempting to improve living conditions.

One does not have to look far to find those who feel that the courts have already gone too far in encroaching upon property rights. For example, Charles F. Barnwell, writing in the *Journal of Public Law* about slum clearance and public housing, has this to say:[7]

> The danger to be feared is quite basic, though perhaps unapparent. Study, whether superficial or intense, reveals the same obvious trend; a trend which, if followed to its logical conclusion, may well result in a greater blow to our democratic system than any lack of adequate housing—no matter how great; a trend which reveals that our courts are often too quick, too arbitrary, too unmindful of the ultimate consequences, in sacrificing or compromising the rights of individuals to make way for these projects of public purpose. The power of a sovereign to condemn slum areas to protect the health, safety, and morals of its citizens is not here questioned; nor is the power to appropriate private property for the public use when the land taken is the obvious, *necessary* choice for the proposed project. The extent to which legislatures have gone in providing for the arbitrary taking of private land and the liberal interpretations by courts of the inherent and acquired powers of the sovereigns to take private lands are the true dangers. For, as the scope of these powers is broadened by the courts, the rights residing with the individual are

[7] Note, *Slum Clearance and Public Housing*, 3 J. PUBLIC LAW 267 (1954).

restricted or abolished. This writer submits that the contested taking of private land by any sovereign or its representative should be disallowed in all instances where such taking cannot clearly be shown to be a *present public necessity;* then the rights of the individual property owner shall prevail. If otherwise, the time may well be forthcoming when the owner of a Victorian home may suffer condemnation as a consequence of legislation requiring a more modern or functional design for buildings within his area.

Although the example of the condemnation of a Victorian house is somewhat extreme, the approach is basically that proposed under conservation where rehabilitation is undertaken through government action rather than through private voluntary action. The question, certainly, is a basic one—one that cannot lightly be ignored. At the same time, the problem of conditions within our cities and the increase rather than decrease in the size of these problems also cannot be ignored. Crowded areas, metropolitan problems, etc., all enlarge the scope of public necessity. Some means must be found to meet the problem. Perhaps the only solution is some sacrifice of individual property rights.

Demolition or Repair of Unsound Structures

Where a conservation area does contain structures that should be demolished because of their condition, the only tool available in nearly all cities is the police power. Under most codes, a house may be declared unfit for human occupancy because of health or structural deficiencies. Where it is a health question, it can be boarded up until the owner repairs or demolishes. Where it is a structural deficiency, it may be ordered demolished if it is unsafe, unless the owner wishes to repair. If the owner does not demolish or repair, then the city may have the authority to demolish, placing the cost of the demolition as a lien against the property.

Although the police power may be the only tool in obtaining the demolition of these structures, it is an imperfect tool. There is no assurance under health violations that the structure will be repaired or demolished. Non-occupancy is all that is required. And where the deficiency is a structural one, the city is usually reluctant to demolish on its own unless it is obviously necessary. As a result, in many cities one will find boarded up structures, uninhabited except by squatters. Such structures are likely to kill the incentive of neighboring property owners to improve their property. Some method is necessary to secure the removal or repair of these substandard structures.

One device that offers some hope is a law that requires the demolition of the structure if the repairs necessary to comply with the local codes amount to more than 50 per cent of the value of the structure. Such a law was recently upheld by the North Dakota Supreme Court,[8] and as a precedent it certainly holds some promise for the forcible removal of these structures. But when the repairs amount to less than 50 per cent, a method is needed to make sure such repairs are made. A possibility would

[8] Soderfelt v. City of Drayton, 59 N.W.2d 502 (N.D. 1953).

be a time limit within which the repairs would have to be made. If they are not undertaken within that time limit, the municipality would have the authority of repairing or demolishing, depending upon the condition of the structure, and placing the cost of the action as a lien against the property.

Repair of these structures, however, may not be the answer. In terms of the standards for the conservation area, repairs up to minimum standards may be inadequate and the structure may not warrant improvement to higher standards. A more promising method of obtaining the removal of these substandard structures, therefore, is the use of eminent domain under the redevelopment powers of the municipality.

Most redevelopment legislation has been written to provide for the acquisition of substandard structures on an area basis—that is, an entire area is acquired and cleared and the cleared land then disposed of for redevelopment. If such laws could be amended to permit the use of eminent domain to acquire scattered parcels of substandard structures in conservation areas, then it would be a relatively simple matter to acquire these derelict houses and, after their demolition, to dispose of the land for new construction. This would have the double benefit of removing the bad and providing the needed new construction in the area. It would also seem an acceptable procedure, for it is but an extension of the authority granted under redevelopment legislation.

An administrative problem would be created, however, in the selection of structures to be demolished. But even here, redevelopment offers precedent. Some redevelopment projects do not demolish all structures in the area. A decision has to be made as to which structures will be allowed to remain.

Illinois has passed legislation specifically authorizing such action—*i.e.*, the use of eminent domain to acquire property in conservation areas.[9] The city, through the Community Conservation Board, may acquire property (§6) where it is necessary or appropriate for the "implementation of a conservation plan." The use of eminent domain for this purpose has been upheld by the Illinois Supreme Court.[10] The case was sustained not on the ground that the public purpose was the clearance of slums but on the ground that the public purpose was the prevention of slums.

> It is also contended that the "line of demarcation between a public and private use in the employment of eminent domain to eliminate slum areas . . . must be the elimination rather than the prevention of slums." But we are aware of no constitutional principle which paralyzes the power of government to deal with an evil until it has reached its maximum development. Nor is there force in the argument that if the use of eminent domain in the prevention of slums is permitted "every piece of property within the city or State can be condemned to prevent it from becoming a slum." Legitimate use of governmental power is not prohibited because of the possibility that the power may be abused.

[9] The Urban Community Conservation Act of 1953, ILL. REV. STAT. c. 67½ §§91.8-91.16 (1954).
[10] People *ex rel.* Gutknecht v. City of Chicago, 3 Ill.2d 539, 545, 121 N.E.2d 791, 795 (1954).

Use of the power of eminent domain rather than police action against owners of substandard property, however, raises a problem of equitable treatment. If eminent domain is used, the property owner is bought out; he receives cash for his substandard structure. If the police power is used, he is forced either to spend money to bring it up to standard or to spend money to have it demolished. He comes off second best to the man whose property was acquired under eminent domain. If juries in condemnation cases were not quite so generous, this might not be the case; but the fact is that illegal use and occupancy are not given sufficient consideration by juries in determining the amount of the award.[11] If the municipality were to be more strict in the enforcement of its housing and occupancy provisions, the value of such property would probably decrease and so would the condemnation awards. The result might eliminate the question of inequitable treatment.

If such acquisition through eminent domain is a public purpose, however, there is equitable treatment. The happenstance of property location would determine whether eminent domain or housing law enforcement would be used to achieve the end being sought. The ends would certainly differ between a conservation program in a particular area and housing law enforcement activity in another area. Equitable treatment would be maintained within a particular program. Even now under redevelopment, there is this question of inequity depending upon location of property but it has not caused the courts to deny the public purpose of redevelopment.

Removal of Adverse Uses

Since an adverse use can often become a non-conforming use by amending the zoning ordinance, the question becomes that of removing non-conforming uses. One method which is found in several zoning ordinances is that of amortizing out such non-conforming uses—*i.e.*, granting them a certain number of years for which the use may be continued but forcing discontinuance of the use at the end of the period. The theory is that within that period the use will be amortized and the owner will not have been deprived of his property without due process of law. The drawback to this arrangement is the time it takes to rid the area of these non-conforming uses. Even if the use were discontinued at the end of the period, 15 to 25 years is a long time to wait; and in the meantime, the non-conforming use continues to exert its adverse influence upon the surrounding property.

A far more practical, albeit more drastic, solution would appear to be the use of eminent domain to acquire the non-conforming use. The municipality would not have to acquire the land—just the use. The owner would be compensated for his improvements and the non-conforming use would be eliminated. The public purpose could well be the municipality's attempt to conserve the character and livability of the conservation area, and since the courts have accepted zoning as a proper

[11] See HOUSING AND HOME FINANCE AGENCY, ADMISSIBILITY OF EVIDENCE OF ILLEGAL USE OR CONDITION OF PROPERTY IN EMINENT DOMAIN PROCEEDINGS (1951).

exercise of the police power, the use of eminent domain to carry out that power should not have too rough sledding in the courts.

Rehabilitation

But the problems of removing substandard, derelict houses and adverse uses from conservation areas are simple compared to the problem of achieving the kind of structural rehabilitation desired in a conservation area. It is in the attempt to solve this problem that one comes up hardest against the traditional concepts of property rights. It is here that one pauses, wondering whether the solution offered creates more damage than the good achieved. For in advancing any positive method for achieving rehabilitation at the standards set for a conservation area, one must recognize that the property owner is to be forced to comply with standards that are higher than those of a minimum standards housing code. Such methods in general mean that he is required to rehabilitate his property in accordance with the standards set by a public body on the basis of what is considered desirable for the area. The idea of maintaining property values instead of the health or welfare of the inhabitants creeps into these proposals. It becomes a basic philosophic question as well as a legal one, and it is a question for which there is no prospect of an immediate solution. The states and their supreme courts will experiment with this problem until some form of equitable solution is reached. It would appear now, however, that our traditional concepts of property rights would have to give way somewhat in order to meet and solve the problems of our deteriorating older areas. That the courts seem to be moving in this direction is evidenced by the recent United States Supreme Court decision upholding the constitutionality of the District of Columbia Redevelopment Act.[12] In this case, the Court said:

> The values it [public welfare] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Although the solution for rehabilitation in conservation areas is difficult, the problem is clear enough. In conservation areas, the rehabilitation desired is of a standard above the minimum standards of the housing code. It involves proper maintenance, painting, landscaping, etc. It involves the improvement of interiors to remove obsolescence—the old bathrooms and kitchens, heating plants, and the like. This is substantial rehabilitation and it is costly.

There are four basic approaches to achieving the desired rehabilitation: (1) voluntary rehabilitation by property owners, (2) higher code standards for conservation areas than for other areas and enforcement through the police power, (3) public acquisition of property to be rehabilitated with disposition to private or public owners who will undertake the rehabilitation, and (4) public acquisition and rehabilitation of such property.

[12] Berman v. Parker, 348 U.S. 26, 33 (1954).

1. *Voluntary Rehabilitation.* It is this method that has received emphasis in the Housing Act of 1954. It obviously does not involve legal questions concerning property rights. It is essentially an administrative problem. Initially, this will have to be the method followed by nearly all localities undertaking conservation programs. Other than in Illinois, state legislation does not now sanction more compelling measures, and it will undoubtedly take some little time for state legislatures to adopt, and for state supreme courts to rule upon, measures that give the locality some authority to require rehabilitation in conservation areas to standards higher than the minimum in the housing code.

Administratively the problem is to persuade property owners in a conservation area to rehabilitate their property to the standards established in the neighborhood plan. Nothing can be done under law to force the recalcitrant or impecunious property owner to rehabilitate to these standards. The city can only enforce the minimum standards housing code against such property owners.

But the city can take some steps to persuade the property owner to rehabilitate. By supplying technicians in the field of architecture and financing, the city may be able to demonstrate that it is to the property owner's advantage to rehabilitate. Also by pointing out the public improvements to be undertaken in the area, some property owners can be convinced that such an investment is a sound one. Congress provided favorable terms for rehabilitation financing in conservation areas under section 123 of the Housing Act of 1954 (adding §220, National Housing Act, 12 U.S.C.A. §1715 k (Supp. 1954)), and this should provide encouragement to the property owner. But without some form of compulsion, the possibility of substantial success is somewhat remote.

Limited as it is, however, voluntary rehabilitation is a method that deserves consideration. It is the only method available; it may prove effective if the proper administrative tools are employed; and the result can be a much improved area.

2. *Higher Legal Standards.* This method employs the authority of the municipality to achieve the standards established as desirable for the conservation area. It may take two forms, neither of which has as yet been tried.

The first form is tied to the police power. The principle is to establish varying minimum standards for various zones within the municipality. Instead of having one minimum standard applicable to all housing in the city, this proposal would establish several levels of minimum standards. The city would then be zoned on the basis of these different standards. Thus the proposal is quite similar to a zoning ordinance where varying standards of lot coverage, set backs, minimum lot size, etc. are established for various areas. An additional variable in such a housing standards zoning ordinance could be time—the age of the structure would in part determine the standards it would have to meet.

Dr. E. R. Krumbiegel, Milwaukee's Health Commissioner, should be credited with first advocating such a proposal and in fact legislation was drafted to provide

for it. But constitutional questions were raised, and the legislation was not introduced.[13]

The method, however, still offers some promise of using the police power to achieve standards of higher rehabilitation than that of the housing code without employing the power of eminent domain.

The second form of enforcing higher level standards differs from the former in the manner in which such standards would be established. Under the second form, these standards would be established by a commission or an authority having jurisdiction over a conservation area. This method has been advocated by the National Association of Real Estate Boards and appears in their proposed enabling legislation for the creation of conservation authorities.[14] This proposal which appears in section 8-1 of their proposed bill reads as follows:

> A Conservation Authority may order the owner of a building or structure to make specific repairs or improvements in order to make the structures conform to ordinances containing health, safety, sanitary, and building regulations, *and to a neighborhood conservation plan* if the repairs and improvements are necessary in order to promote public health, safety and morals. The repairs or improvements so ordered shall be made at the expense of the owner. [Emphasis added.]

This method provides for greater flexibility than the former; but even with the safeguards of public hearings and city council approval of the conservation plan, there is still the danger that the courts will conclude that the standards established by such an authority are arbitrary. The *Berman* case (*supra* note 12) would indicate a trend toward supporting such legislation however.

The method provided for in the Illinois legislation does not permit the Community Conservation Board to establish higher police power standards for a conservation area but does provide the tools for achieving higher standards.

3. *Public Acquisition; Disposition for Rehabilitation.* The last two methods of achieving rehabilitation standards above those of the minimum standards housing code involve the use of eminent domain. They differ in the way in which the rehabilitation would be undertaken. In one instance, such property would be sold to private developers with stipulations that it be rehabilitated to certain standards. In the second instance, the property would be rehabilitated by the municipality itself, or a municipal authority and then disposed of.

The former method has already been employed by Philadelphia in the rehabilitation of one block by the Friends' Service Committee. The rehabilitation undertaken, however, was so drastic that it really constituted redevelopment rather than rehabilitation. The structures were gutted; essentially only the walls remained.

[13] For a more detailed discussion of this proposal, see Slayton, *Urban Redevelopment Short of Clearance* in COLEMAN WOODBURY (ED.), URBAN REDEVELOPMENT: PROBLEMS AND PRACTICES 313, at 349-353 (1953).

[14] NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, BLUEPRINT FOR NEIGHBORHOOD CONSERVATION (1953).

The cost was close to the cost of new construction.[15] Thus this kind of rehabilitation is considerably more drastic than that generally anticipated in conservation areas. This particular action has not been tested in the courts.

Chicago is the only city with legislation specifically authorizing this kind of action. Under the Illinois Urban Community Conservation Act,[16] the conservation board is given the authority to (§6) "acquire by purchase, condemnation or otherwise any improved or unimproved real property the acquisition of which is necessary or appropriate for the implementation of a conservation plan for a Conservation Area. . . ." In disposing of such land, the "buyer or lessee must as a condition of sale or lease, agree to improve and use such property according to the conservation plan."

The Housing Act of 1954 would presumably permit this kind of action too, for in its definition of conservation and rehabilitation the following (§311(c), 42 U.S.C.A. §1460(c) (Supp. 1954)) is included: "(4) the disposition of any property acquired in such urban renewal area . . . at its fair value for uses in accordance with the urban renewal plan."

The principle of disposition for rehabilitation is the same basically as the principle of disposition of cleared land for redevelopment. One can anticipate a write-down in the cost of the property as in the case of urban redevelopment. But it does raise questions that are not easy to answer. If a write-down is involved in disposing of property for rehabilitation, it would seem only equitable to offer to resell the property to the original owner, giving him the benefit of the write-down. Under redevelopment, this is generally not practicable for replatting is usually the rule and the original parcel loses its identity.

A second question raised by this procedure is whether, in establishing rehabilitation standards for the conservation area, the municipality may be forcing an owner to give up his property and, even where it is allowed, effectively preventing him from reacquiring it for rehabilitation because of his financial inability to improve the property to the standards set for the area. Thus it can be claimed that this kind of arrangement discriminates against the financially limited property owner, forcing him to dispose of his property solely because of his economic station. This might easily be construed as using municipal authority to limit occupancy of an area to those with economic means above a certain level.

4. *Public Acquisition; Public Rehabilitation.* Perhaps because of the problems raised in disposition for rehabilitation, some advocate the use of eminent domain to acquire properties that are below the standards set for the conservation area and for some public authority to undertake the actual rehabilitation, disposing of the propery after it is rehabilitated. It is this procedure that is emphasized in the Illinois

[15] For a detailed description of this project, see *Block Modernization, Philadelphia Slum Modernization,* 93 ARCHITECTURAL FORUM 172-175 (1950); see also, Lammer, *Rehabilitation Has Taken Three Forms in Philadelphia,* 12 J. HOUSING 47, 49-59 (1955).

[16] See note 9 *supra.*

Urban Community Conservation Act. The Act (§6) gives the Conservation Board the authority to "hold, improve, mortgage and manage" properties acquired and spells out the procedure under which such properties will be rehabilitated by the Board: "provided that contracts for repair, improvement or rehabilitation of existing improvements as may be required by the Conservation plan to be done by the Board involving in excess of $1,000.00 shall be let by free and competitive bidding to the lowest responsible bidder. . . ." Thus public rehabilitation is a definite and important part of the conservation methods included in the Act.

Another form of public rehabilitation occurs when the municipality or a municipal corporation is given the authority to undertake repairs of property when the owner refuses to obey an order to make such repairs. The cost of such repairs becomes a lien upon the property. But where a municipality or municipal corporation may order repairs to standards above that of existing ordinances—repairs that are necessary to make the structure conform to the conservation plan—then the action is essentially that of public rehabilitation without public acquisition. The proposed enabling legislation of the National Association of Real Estate Boards contains such a provision. The section granting authority to require repairs to standards of the conservation plan has already been quoted. Following this provision, are a series of provisions spelling out the procedure for the Conservation Authority undertaking such repairs and placing the cost thereof as a lien upon the property.

With voluntary rehabilitation providing something less than a sure method of achieving rehabilitation of the structures in the conservation area and with zoned standards receiving little attention and of doubtful constitutionality, the trend seems to be towards either special standards set by a special authority or the use of eminent domain in some form to achieve rehabilitation. If eminent domain is to be used, a good deal of thought must go into justifying its use as a public purpose. Under urban redevelopment, the public purpose is the clearance of the slum—allowing it to continue would endanger the health and welfare of the city's inhabitants. The disposition of the land and its rebuilding, the courts have said, is incidental. Once the land has been acquired and cleared and provisions made so that it will not be misused in the future, the public purpose has been achieved. The fact that it is sold to private builders is not a misuse of the power of eminent domain; property is not taken from one and given to another. Where rehabilitation is the end product and where the conditions of the structures in the area are not definable as "slums," no slum clearance is involved. The public purpose must be the prevention of the area from becoming blighted. The public purpose is to prevent rather than to remove. This is a considerable extension of the public purpose concept.

The first case involving this principle has already been cited (*supra* note 10). It is an important precedent but it is not necessarily true that other state courts will follow this example. Some state supreme court decisions on redevelopment cases would indicate that they would not go this far. Generally, the Illinois Su-

preme Court has been liberal in its interpretation of public purpose in connection with slum clearance. It is one of three states that has held that predominantly open land—dead subdivisions—may be acquired by eminent domain and redeveloped.[17] It was also an early state in declaring slum clearance and urban redevelopment a public purpose.

A more cautious approach to the use of eminent domain in conservation areas might be the acquisition of a limited interest rather than the entire property. In some redevelopment projects, the redevelopment agency has bought a limited interest in some of the property, property not to be demolished but still requiring some kind of remedial treatment. The owner agrees to use the property in certain restricted ways and to make certain improvements and the redevelopment agency compensates him for relinquishing this interest. Under conservation, this kind of limited acquisition might prove workable—with the property owner agreeing to restrict the use of his property and to rehabilitate it in certain ways. Or if he does not agree, then the municipality or some municipal corporation has the right to condemn these rights.

It would appear, however, that the only means of assuring complete adherence to the conservation plan and of achieving rehabilitation to the standards established in the plan is through the use of the power of eminent domain in connection with those properties where the owners are unwilling or unable to cooperate. The basic question is whether the use of the power of eminent domain for such a purpose is a public purpose—whether property is being taken without due process of law. In such cases it would seem wise to employ the power of eminent domain sparingly at first and, where possible, authorize a more limited form of eminent domain than the authority now available under redevelopment. In short, to authorize authority that is too far in advance of current thinking, is to jeopardize the entire concept. At the same time, it must be recognized that unless municipalities are granted greater authority over the maintenance of sound living conditions, they will be unable—as they now are—to cope with the increasing problem of slums, blight, and deterioration in larger and larger areas.

Before leaving rehabilitation, one further problem should be discussed. This is the problem of applying current building code requirements to rehabilitation construction. If no rehabilitation occurs, the city accepts the standards of the existing structure so long as it meets minimum housing code requirements. As soon as rehabilitation occurs, however, the house is no longer acceptable. All new work must conform to present building code regulations. New plumbing must meet today's requirements. So must new wiring, new walls, etc. On the face of it, this seems inequitable. An extreme example involves window area to floor area ratio. Many older houses have dark entrance halls, separated from the living room

[17] People *ex rel.* Gutknecht v. City of Chicago, 414 Ill. 600, 111 N.E.2d 626 (1953); Redevelopment Agency of the City and County of San Francisco v. Hayes, 122 Cal.App.2d 777, 266 P.2d 105 (1954), *cert. denied*, 348 U.S. 897 (1954); Oliver v. City of Clairton, 374 Pa. 333, 98 A.2d 47 (1953).

by a non-load bearing wall. Removal of this wall results in enlarging the room and improving the house generally. Its removal, however, may violate the window area to floor area ratio and necessitate enlarging the windows as well.

Application of the building code to rehabilitation work, therefore, can create many problems, increase costs, and discourage the operation. A solution would be building code standards for rehabilitation. This is easy to propose, though hard to achieve for it too creates problems. But it is a solution that has much promise, and city officials should attempt drafting building codes that will apply to rehabilitation work.

Relocation

As pointed out earlier in discussing relocation, a conservation program will result in the displacement of people. Enforcement of occupancy provisions, displacement during major rehabilitation, demolition, and moves because of inability to pay increased rents—all force the movement of people. Most families in conservation areas will have sufficient incomes to permit them to move to quarters that are decent, safe, and sanitary. So the relocation problem in conservation is not that of trying to rehouse families of low income. The problem is that of assisting the families thus displaced to find new quarters. Relocation responsibility is a standard requirement in the federal urban redevelopment program and some cities seem to be accepting greater responsibility for housing families displaced because of governmental action.

The legal problem is the recognition that such assistance is a legitimate local expenditure and that public funds can be so used. Other than in redevelopment legislation, there is little if any legislative recognition of relocation as a legitimate use of tax funds. There would seem to be no great legal hurdles to obtaining such legislative sanction. Such legislation should authorize assistance in the form of administrative help in finding suitable quarters and, in some instances, direct financial assistance to such families for moving expenses.

Financing

There are two kinds of financing problems that arise under a conservation program. One is municipal finance; the other individual finance. How does the city finance the work it must undertake in connection with a conservation program and how does the individual finance the rehabilitation of his house?

The municipal financing problem arises in providing the needed community facilities and in meeting the cost of rehabilitation operations that result in a loss. Also administrative costs may not necessarily be low since a good deal of service is contemplated in a conservation program—particularly where a program of voluntary rehabilitation is carried out. These items add up to a sizable amount for a city that wishes to pursue an active program, and with cities hard pressed for funds, a device to produce such funds would be helpful.

The special assessment is an approach some have proposed. Usually it is limited to the area being conserved on the theory that that particular area is the one to

receive the benefits and that therefore it should be the area to pay for the improvements. Politically, this proposal is not likely to get very far. Residents of such areas will soon object, and conservation programs will tend to be discouraged. It also seems inequitable to assess the owners in the area for improvements when such owners have for years been paying for improvements in outlying areas. Improvements being provided in the conservation area represent deferred construction and are no less important than improvements in newer areas.

A second proposal for paying the municipal costs without raising taxes is to make use of the increased revenue that is anticipated from the improvement of the area. It is logical to assume that property assessments will be increased as a result of the rehabilitation of structures in a conservation area, and an earmarking of such increased taxes to pay for the municipal costs sounds reasonable. Whether the increases would equal the municipal costs is hard to say, but they would at least reduce them. One device might be the issuance of revenue bonds and the pledging of the increased taxes for their repayment. Whether a legal device is used to relate expenditures and increased income, the relationship is a valid one and is useful in demonstrating the soundness of undertaking conservation programs. At the same time, it is an argument that some use against improving their property—the fear of increased taxes.[18]

The National Association of Real Estate Boards proposes federal insurance for conservation area bonds in order to produce lower interest rates and better marketability. These conservation area bonds would be used to provide the needed public improvements and to pay for the acquisition of the property needed to carry out the conservation plan.[19]

Unless cities are provided with some means of raising additional revenue for the needed public improvements in conservation areas, there is not likely to be much conservation. One bright hope, of course, is the Housing Act of 1954 (§305, 42 U.S.C.A. §1453(a) (Supp. 1954)) which provides for a federal grant covering two-thirds of the cost of the project. Included within the cost of the project are the necessary public improvements as well as the administrative and planning costs and the write-down in the disposition of property. This provides a considerable incentive to cities to undertake conservation programs and would seem to make it possible for any city with a real will to undertake a conservation program to do so.

Individual financing, however, is another question. There is no federal grant to the impoverished property owner. The Federal Government cannot pay two-thirds of the cost of rehabilitating his home. The inability of the home owner to finance the rehabilitation creates a major stumbling block and often forces one to seek solutions that bring governmental authority into the picture.

[18] Some have proposed non-assessment of increased value created by rehabilitation. The theory is that assessment discourages property improvement. This proposal is unsound on the face of it but it is cited as an example of a tendency to put rehabilitation in the center of municipal functions and misuse other municipal functions to support rehabilitation.

[19] BLUEPRINT FOR NEIGHBORHOOD CONSERVATION, *op. cit. supra* note 14.

Where the financing problem, however, is one caused by difficulty in obtaining loans because of the character of the area, then there are solutions. Under the Housing Act of 1954 (§123, 12 U.S.C.A. §1715k (Supp. 1954)), mortgage insurance is provided for the rehabilitation of houses in areas approved by the Federal Government as appropriate for urban renewal projects. So long as the city is carrying out a federally approved conservation plan in the area, FHA is authorized to insure mortgages in the area. Also the Housing Act of 1954 provides for open end mortgages, an arrangement under which the amount of the existing mortgage may be increased to provide funds for improving the property.

The fact that financing is available does not answer the basic question of individual financing. The question of individual financing is dependent upon the decisions of the community on the standards for the conservation area. Where the standards are not raised too high for the present occupants, a good deal of assistance can be given in the way of advice on arranging the family's finances to permit investment in the improvement. Also, one finds that many families can afford to pay higher amounts for housing and that it then becomes a question of values—placing a higher value upon better housing than upon the consumption of other goods.

New Construction

One cannot, of course, force individuals to build in these conservation areas: one can only demonstrate that it is economically sound to do so and, by providing the necessary community facilities, achieving the proper rehabilitation of the structures, and providing favorable financing terms through FHA, make it desirable to do so. In addition, the municipality can through its redevelopment and public housing powers undertake new construction in these areas on its own. If there is a pocket of slum structures in the area, the municipality may clear it under its redevelopment legislation and provide for the construction of new residences by the redeveloper. With its authority to erect public housing, the municipality may again construct public housing units in the area. In this instance, it does not necessarily have to clear part of the area but can build on scattered vacant lots if any are available. Through these two methods, the municipality can demonstrate that it is desirable to undertake new construction in the area and provide the environment that will encourage new construction in adjacent locations.

Most redevelopment laws provide for slum clearance and urban redevelopment on an area basis. Some even specify a minimum area. An immediate legal problem then is the amending of legislation to permit scattered acquisition. But in carrying out a program of scattered acquisition for slum clearance and urban redevelopment, one opens himself to the charge of arbitrary determination of the structures to be acquired. Where slum clearance and urban redevelopment is undertaken on an area basis, the courts have held that standard structures may be acquired so long as the character of the area itself is blighted or slum. Thus the taking agency, the redevelopment agency, is spared the decision of judging among those houses to be

acquired and those to be passed up. The agency cannot be accused of arbitrary determinations. But under selective acquisition and clearance, the charge is bound to be made. Citizen *A* points out that his house is better than citizen *B*'s but that his, rather than *B*'s, is being acquired.

If the problem of standards to determine selective clearance can be met, then the slum clearance and urban redevelopment process would seem particularly useful in providing the necessary new construction. Rebuilding would be by private enterprise except in those instances where the new use was public housing. The problem of encouraging the private enterpriser to undertake construction on these scattered parcels in the conservation area is met by (1) selling him the land at a price that will make it feasible for him to undertake the construction and by (2) having under the Housing Act of 1954 a provision of mortgage insurance specially designed for new construction in conservation areas.

These then are the basic legal problems raised in a conservation program. Their solution is not simple. To resolve them requires basic philosophic decisions—the kinds of decisions that should not be made quickly. They will require court deliberation and vigorous discussion before a settlement is reached. The problem's difficulty is the importance of the two alternatives—a lessening of the individual's property rights on the one hand, the continued deterioration of cities and housing on the other. The conflict is real; the decision difficult. Probably, as in the past, compromise of some sort will be the answer.

ADMINISTRATION ORGANIZATION

Something should be said about the administration of the conservation program, for such a program creates new and difficult administrative problems for the city. In addition, the number of proposed solutions to this question is considerable. Many solutions have specific champions—champions carrying considerable weight but unfortunately not always well versed in local government.

There are two questions of administrative organization; one dependent upon the solution of the other. The basic question is whether the authority for undertaking a conservation program should be vested in the city or given to a new independent authority with considerable powers of its own. The second question is that of the administrative organization within the city itself if the decision is to vest the authority for the program in the city.

City *vs.* Separate Authority

The arguments of those who advocate a separate municipal authority with considerable municipal powers are based upon the failure of the cities to undertake such programs and upon the necessity of coordinating many municipal functions in one area—a conservation area. A further argument is that a separate authority with independent powers will be free from political control and pressure and therefore can accomplish the job more efficiently and effectively.

The National Association of Real Estate Boards is the major champion of the separate, independent authority concept. In *Blueprint for Neighborhood Conservation,* they propose an independent authority with considerable independent power. In presenting their proposal, they state:[20]

> Neighborhood conservation requires added municipal powers in law enforcement, in levying of benefit assessments and taxes, and in acquisition of property or uses or portions of properties.
>
> It requires the use of these powers in coordination with such municipal functions as planning, zoning, and platting of land. In addition, it requires close cooperation with city boards and departments governings schools, parks, recreation facilities, libraries, sanitary services, streets, and sewers.
>
> Success of the program depends upon effective coordination of all these diverse kinds of work. Existing city departments have their city-wide functions and should not be disturbed or expected to absorb the major responsibility of carrying through neighborhood conservation programs.
>
> To provide the proper administrative framework for effective neighborhood conservation, it is proposed that the state legislatures enable the cities to create a new arm constituted something like a school board, to do this particular job.

The powers proposed for the conservation authority include the power of eminent domain, the power to enforce building and housing codes in the conservation area, the power to issue neighborhood conservation bonds to provide funds for public improvements and to acquire the property necessary to carry out the conservation program, the power to levy benefit assessments, the power to levy a city-wide tax, the power to contract with the Federal Government for the insurance of neighborhood conservation bonds, and though not specifically stated, the power to prepare the plan for the area. These are considerable powers and no check by the municipality is provided other than that of appointment of authority members by the mayor.

Such an authority would have many of the powers of the city and would in effect provide an additional municipality but with none of the city's democratic controls; that is, the separate authority would not be responsible to the voters. The NAREB proposal is used as an example; other organizations have proposed somewhat similar arrangements, particularly the National Association of Home Builders.

The opposing position states that the problem is essentially that of coordinating existing municipal functions—not an impossible task by any means—and that the creation of a separate authority to undertake a specific job creates a difficult problem of coordination in itself since it would be duplicating many of the municipality's functions. The case for use of the existing municipal structure to undertake a new municipal activity rather than vesting such an activity in a specially created inde-

[20] *Ibid.*

pendent authority was stated by Herman G. Pope, executive director, Public Administration Service, at a conference on conservation and rehabilitation:[21]

> The case for integration of local government functions is impressive in many jurisdictions. Reasonable integration of any municipal function with the existing municipal government structure can be supported on a number of counts. One of these counts rests on the premise that responsible and responsive democratic government requires that dispersion of responsibility and of policy making authority should be held within reasonable limits. The existence of too many autonomous and semi-autonomous governmental agencies complicates local government to the point where the average citizen loses interest and capacity to understand it. . . .
>
> Also, where the fragmentation of local government occurs, the various fragments are all too often only indirectly responsible to the public. Members of governing boards and commissions may be appointed by various authorities or combinations of authorities and instances can even be found where such boards and commissions are self-perpetuating. The existence of autonomous boards, commissions, and authorities complicates enormously the problems of local government coordination.

To students of public administration it would seem that the weight of the evidence is on the side of the conservation program becoming integrated with the regular municipal corporation rather than being administered by a separate, independent authority. Where a program such as the conservation program requires the exercise of so many of the existing functions of the municipality, it would seem more than unwise to create a new and duplicating agency to carry out the program.

Administrative Organization Within the City

There is, as might be expected, a good deal of variation among the proposals for administration of the conservation program where it is to be administered by the city. The proposals, however, fall into two basic categories: (1) the creation of a new department with authority to exercise functions of other departments within the conservation area (some propose to give such a department greater autonomy than existing departments), and (2) the use of existing departments to perform the necessary functions with coordination provided through a coordinator. A third possible position, and one that some cities may follow, is to make no administrative changes but to rely upon interdepartmental coordination to carry out the program properly.

The particular type of administrative organization depends upon the city itself; the ability and authority of those in positions of authority; and the traditional way of handling administrative problems. Many ways can be successful. It is more important to emphasize the administrative problems than to propose a pat solution.

The basic administrative problem of a conservation program is that of coordination. Many municipal functions will be performed in a conservation area. Their

[21] National Round Table Conference on the Role of Conservation and Rehabilitation in Community Development, April 28-30, 1954, Chicago, Ill., sponsored by the Public Administration Clearing House, the American Society of Planning Officials, and the National Association of Housing and Redevelopment Officials.

timing is important. They will be performed by many departments. Some functions will be comparatively new. The Federal Government will probably be involved and will have to be satisfied periodically that the program is progressing as planned.

Specifically, a plan will have to be prepared for the area. This will involve commitments from those departments that supply community facilities—the school board, the highway department, the park board or department, etc. Each will have to include the improvements in its program and will have to be told when the improvement is to be installed. Land will be acquired. Determinations will have to be made as to which areas are to be rehabilitated, which to be acquired and demolished. The agency that works on rehabilitation will have to know the decision on what is to be acquired. If housing law enforcement is used, the enforcement agency must plan its inspection program in conjunction with the agency undertaking rehabilitation. It too must know the decisions on property to be left and property to be acquired. Someone in authority must be able to execute contracts with the Federal Government and have the authority to contract to perform certain specified actions. All these activities require some coordinating device, some directing authority with sufficient authority to obtain action—in short, responsibility for the program must be identifiable.

Several cities, notably Chicago and Philadelphia, have hit upon the housing and redevelopment coordinator as the device for achieving such coordination. In each instance, the office is directly responsible to the mayor and has the authority of the mayor behind it. Other cities are exploring this possibility.

Chicago also has established a Community Conservation Board to select conservation areas and plan the conservation program in such areas. The Conservation Board has been given considerable authority but unlike most housing authorities and redevelopment agencies it is not an independent agency but is part of the city government.

Where the city has a city manager, it has been proposed that an assistant to the city manager in charge of the conservation program be appointed. Cincinnati has suggested this procedure. Other cities tend to rely upon established agencies, such as the redevelopment agency, to be responsible for the execution of the conservation program.

The pattern, however, is fairly clear. The coordination of all the functions required in a conservation program necessitates centering authority and responsibility. The precise location is immaterial; but some one agency or individual must be given the responsibility. If the program fails, he is responsible; if it is successful, he receives the credit.

In summary, the administration of the conservation program creates no problems new to public administration. It intensifies the problem of coordination but not to the extent where an administrative device cannot be found to solve it. Centralization of authority and responsibility is essential but not to the point of separating the conservation agency from the rest of the city government.

A word should be said about the role of the planning commission in the administration of the conservation program. In addition to the delineation of areas in the city on the basis of the kind of remedial treatment or treatments required to improve them, the planning agency must also prepare at least general plans for each conservation area. In addition it must gear its public improvement program to the needs of these conservation areas. It must decide, or at least recommend, those areas to be blessed and those areas to be slighted when it comes time to deal out the money for public improvements. All planning agencies should be exercising such functions now, but with the advent of a conservation program, they will be forced to. They will have to make decisions and stick by them. In short, they will have to do a good deal more planning and will have to be a good deal more decisive than they have in the past. The planning decisions are the major decisions and they will have to be made early in the program.

SUMMARY

The administrative problems of conservation though difficult are not insurmountable. The cost is not small but federal financial aid is available. The program seems essential if American cities are to solve the problem of gradual (and sometimes precipitous) deterioration of neighborhoods. Effective conservation programs would seem to require some further lessening of individual property rights. Does the public good emanating from a conservation program outweigh the lessening of these property rights? The question is for the people through their legislative bodies and their courts to decide. The alternatives—gradually deteriorating cities or diminished individual property rights—are not pleasant. Perhaps, as before, the answer lies in compromise—a modified conservation program with somewhat diminished property rights.

PRIVATE ENFORCEMENT OF CITY PLANNING

ALLISON DUNHAM*

Some years ago an urban land economist observed that official city planning could effectively pre-determine the future structure of a city only if "social controls" were "applied to certain market forces or modifications . . . made in the institutional framework within which the market operates. . . ."[1] While it is possible that city planning could influence market behavior merely by making information in the form of "studies" available to private sellers and buyers who do not do their own market analyses, the main influence of any city plan on the market comes from action which deters or stimulates the making of choices of an owner as to use of his land. The city plan is usually translated into action affecting the free market through zoning, official street maps, subdivision control, housing and building codes, capital budgeting, and redevelopment legislation.

Perhaps it is because the constitutional basis of most planning legislation is found in the "police power" or perhaps it is because the draftsmen of planning legislation have been influenced by experience in drafting laws regulating saloons, bawdy houses, and public nuisances, that we have looked mainly to the criminal law for the "control" applied to the operation of the free market. While by hypothesis we are trying to force property owners not to make decisions which they regard as profitable, we have expected a fine, usually a small one, to deter such owners from making these choices.[2]

Perhaps if planning had been in the hands of sympathetic "conveyancers" rather than the municipal or constitutional lawyer we might have had a different emphasis. We might have used the local real property tax as our model for enforcement rather than the bawdy house ordinance. While some states may impose criminal sanctions to force payment and some do impose personal responsibility for tax payment and while there is always the threat that the taxing authority will foreclose the tax "lien" if the tax is not paid, the main enforcement in practice comes from the market consequences of the existence of the tax lien. This lien is an "encumbrance" on the title. Abstractors, conveyancers, and title companies are employed by buyers in the market to ferret out the "violation" (*i.e.,* nonpayment) of the tax. In part this is because of the strong tradition of the market that on sale title is to be

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[1] Ratcliff, *A Land Economist Looks at City Planning,* 20 J. LAND & P. U. ECON. 106, 107 (1944). See also RICHARD U. RATCLIFF, URBAN LAND ECONOMICS 409 (1949).

[2] Other controls have been: power in city to abate nuisances or enjoin violations; power to cut off water and other municipal services from violator; and in redevelopment legislation the power of eminent domain and the spending power. See JOSEPH D. MCGOLDRICK, SEYMOUR GRAUBARD, AND RAYMOND J. HOROWITZ, BUILDING REGULATION IN NEW YORK CITY (1944).

"marketable" and in part it is because the "encumbrance" of the real property tax violation brings into the enforcement picture another potent private group tending to compel performance. Building and loan associations, banks, insurance companies, and other regulated institutional lenders who supply the bulk of the capital in the real estate market[3] are by law required to refuse to make loans on security of "encumbered" titles. Moreover the priority which subsequent tax liens have over earlier real estate mortgages forces these lenders, even though they have made a loan on a clear title, to "police" the mortgagor-land-owner's management of the property to see to it that he pays the tax. In short the real property tax is in large part "enforced" by private enterprise itself because of the impact of the tax on the real estate market. One need compare only the most conservative estimates in large cities of the percentage of lots complying with the real property tax with the percentage of lots complying with planning laws to note the effectiveness of this method of enforcement.

It is the purpose of this paper to examine the existence of and the possibility of similar and other methods of private enforcement of planning legislation. Jurisprudentially it might be said that all enforcement is by the state. The rule of law that the lien for the unpaid property tax is an encumbrance and that insurance companies may not invest in a mortgage on such property is as much a rule of government as the rule that a building code violation subjects the owner to a $2.00 per day fine. But, for present purposes, we treat as "public" enforcement any judicial or administrative proceeding initiated against land or its owner by appropriate government officials to secure enforcement of planning laws.[4] We treat with three types of "private" enforcement in this paper: (1) enforcement arising from the operation of the real estate market as a result of some rule of law affecting the commodity, marketing practices or institutions; (2) enforcement by means of direct legal proceedings commenced by private citizens or associations of citizens against the violators of city planning legislation; and (3) enforcement by means of initiation of public prosecutions by private persons. Types two and three are most nearly analogous to "public" enforcement since but for a difference in initiator of the legal proceedings the type of relief is substantially the same.

I

ENFORCEMENT THROUGH UTILIZATION OF THE MARKET AND ITS INSTITUTIONS

Planning legislation is complied with the more, the more it affects the self-interest of landowners. Thus if fines are large enough and certain enough, it may be unprofitable for an owner not to comply. But the controls on the market considered in this section of the paper operate more directly on marketing forces and practices

[3] See ERNEST MC. FISHER, URBAN REAL ESTATE MARKETS: CHARACTERISTICS AND FINANCING 66 (1951) for volume of mortgage loans by type of lender. The institutions mentioned in the text furnish 73.2 per cent of mortgage capital in the real estate market.

[4] For a detailed treatment of many types of public enforcement, see MCGOLDRICK, GRAUBARD, AND HOROWITZ, *op. cit. supra* note 2, c. 8.

rather than directly on the owner and through him on the market. Controls considered here directly affect the merchantability of the product.

Violation of planning legislation may make the landowner's product less merchantable, by: (A) threatening the income forthcoming from the property; (B) making it difficult to adhere to established management and marketing practices; and (C) rendering the title defective so that buyers and lenders will not or cannot purchase an interest in his commodity.

A. Threatening the Income from the Property

The most direct impact on income from violating property is that found in statutes such as Section 302 of the New York Multiple Dwelling Law which provide that a tenant in a building without certain certificates need not pay rent and that a landlord cannot evict him for such non-payment. This statutory remedy is a radical departure from the common law where the tenant's only excuse for non-payment of rent arises from a "constructive eviction," that is, the premises become so untenantable through a violation of a landlord's duty, that the tenant is obliged to remove himself from the premises and is excused thereafter from paying rent.[5] It is suspected that compliance with this type of planning law would come with unparalleled speed if the occupants of violating builders were armed with an effective club of continued occupancy without rent payments until the owner razed the building or obeyed the statute. However this New York statutory remedy has not been effective. It is not available for violations generally but only for failure to have a certificate of occupancy. But its big weakness stems from a misconception of the nature of the rental market in substandard housing. The landlord is "outlawed" from court only for actions for non-payment of rent. Since most tenancies in substandard housing are of relatively short term the landlord can, by appropriate notice, terminate the tenancy shortly after the tenant refuses to pay rent and thereafter evict the non-paying tenant even though the building violates the law. This substantially reduces the risk of loss of income to the landlord, particularly if there is a brisk demand for this type of housing.[6]

The income from rental property may be affected by another type of law.[7] In some jurisdictions, such as California, a tenant can, on his own motion, repair a sub-

[5] See generally on this doctrine, 2 RICHARD R. POWELL, THE LAW OF REAL PROPERTY §227 (1950).

[6] Until 1950 there was an additional threat to the landlord. He could not, under Sec. 260 of the Multiple Dwelling Law, dispossess a tenant in a violating building who refused to pay a rent larger than the lowest rent charged for any month between September 1937 and March 1938. After many extensions this remedy was allowed to expire in 1950.

In *Detroit Hits Code Violators in Pocketbooks With Old Law*, 12 J. HOUSING 61 (1955), it is reported that a Detroit ordinance prohibiting collection of rent in buildings as to which notice to vacate has been served is now being enforced. For statutes similar to that in the text, see CONN. GEN. STAT. tit. 30, c. 196, § 4080 (1949); IOWA CODE ANN. §413.106 (1954); MICH. STAT. ANN. §5.287 (1949). See generally, 144 A.L.R. 259 (1943).

[7] States which impose tort liability for breach of the statutory duty of repair also indirectly "threaten" the income of a non-complying owner by increasing his insurance risk. See 2 POWELL, *op. cit. supra* note 5, §238.

standard building and withhold rent until reimbursed for his expenditures.[8] This remedy is also a substantial change from traditional landlord and tenant doctrines but it is ineffective because it is subject to contract between landlord and tenant.

B. Making It Difficult to Adhere to Established Practices of Property Management and Marketing

A penalty for violation of planning legislation may "upset" established practices in property management. Thus many housing and building codes provide that the statutory fine or imprisonment falls on the rent collector, management agent, contractor, and architect as well as the owner.[9] Other practices on which planning might impinge are those concerning insurance, mortgages, and marketing by reference to a map.

Violations of planning legislation may affect an insurance policy in several ways. Thus some violations may cause a policy to be avoided under a clause making a policy void in case of ordinance violations; or the violation may result in an "increased hazard" exception to loss under the policy; or it may avoid or suspend the policy on a theory of illegal use; or the violation may cause a breach of warranty.[10] The above possibilities exist only when the violation has some relation to risk (*e.g.*, violation of electrical code) and the reluctance of courts to construe policies to except losses which have occurred makes this method of enforcement not too effective. A stronger possibility would arise from inducing insurance companies to cancel or threaten to cancel policies on violating properties. In some communities the method is used with respect to fire laws. To compel the insurance industry to participate would appear to require legislation in most states. Where the state supervisory agency has power to prescribe a standard policy form, a cooperating insurance commissioner might be prevailed upon to insert a cancellation or avoidance clause in the policy. But the supervisory agency does not, in normal cases, seem to extend to compelling companies to establish a practice of cancellation on notification of a violation or to compelling establishment of a differential rate classification for violating or non-violating properties.[11]

The threat of cancellation whether obtained by agreement or compulsion is effective, however, because of the impact of cancellation on another private agency—the mortgagee. Many mortgages provide for a default and possible acceleration of the mortgage if the mortgagor fails to carry insurance.[12]

[8] See CAL. CIV. CODE §1942 (1949); MONT. REV. CODE tit. 42, §42-202 (1947); N.D. REV. CODE c. 47, §47-1613 (1943); OKLA. STAT. tit. 41, §32 (1951); and S.D. CODE §38.0410 (1939).

[9] See MCGOLDRICK, GRAUBARD, AND HOROWITZ, *op. cit. supra* note 4, at 458; N.Y. MULTIPLE DWELLING LAW §305 (1946).

[10] For an "increase in hazard" clause, see New York Standard Fire Policy, N.Y. INS. LAW §168(5) (1949). See generally on the defenses of the insurer relating to violations, VANCE ON INSURANCE §146 (3rd ed. 1951); JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE §2871 (alteration of premises), §2878 (change in class of occupation and use), and §2880 (illegal use) (1941).

[11] See N.Y. INS. LAW §169 (1949) on power to prescribe policy forms. For rating powers see N.Y. INS. LAW §§181-189 (1949).

[12] For some institutional lenders this provision is required for eligibility of mortgage. See, *e.g.*, Illinois Building and Loan Law, ILL. REV. STAT. c. 32, §231(b) (1951).

Another established management practice is the use of borrowed capital which is repaid to the creditor at stated intervals in the future. In New York by statute and in many states by mortgage clause a mortgagee has power to accelerate payments of mortgage principal in case of violation of municipal ordinances applicable to the mortgaged property.[13] These clauses tend to secure compliance with the local ordinance only to the extent that mortgagees establish a practice of exercising their contractual or statutory power of declaring the mortgage in default if violations are not cleared up. If such a practice were firmly established there is no doubt that this would seriously interfere with established management practices of landowners and could compel compliance. In some communities property owners' associations have a policy of reporting violations to mortgagees of record and this has frequently induced compliance.

Without a certain amount of compulsion or obvious self interest it is unlikely that a mortgage lender will exercise his power of acceleration on a mortgage on which the mortgagor is making regular payments, perhaps only because of the increased income resulting from his violation of planning laws. While the journals and books of the mortgage industry abound with articles and advice about the necessity of "servicing" a mortgage by periodic inspections to see to it that the mortgagor does not "milk" the property by causing excessive deterioration, the mortgage lender does not yet realize that the building department could be made an adjunct of his own servicing department by giving him the reports of the government inspectors.

Perhaps the planning legislation which has the clearest recognition of the use of market forces to obtain enforcement is the subdivision control legislation. While most subdivision control laws have various forms of criminal penalties, the central theme of enforcement is that unapproved plats of a subdivision are not entitled to recordation.[14] The assumption of such a "penalty" seems to be that the custom of describing property by reference to maps is so strong and so convenient that the subdivider will submit his map for approval even though there is in most such laws a technical "loop-hole" permitting use of a metes and bounds description. If the recorder does his job there is something more than a mere threat of a fine to a subdivider for using an unapproved map—he cannot use the short-hand method of describing his land which the marketing institutions approve.

Many subdivision laws make further use of the market as a method of enforcement. Some provide that an unapproved map even though mistakenly filed is not a matter of record; that sales from such maps may be avoided by purchasers; that public improvements cannot be located by municipal governments in unofficial streets (which streets on unapproved maps are said to be); and that building permits will not be issued for buildings facing on unapproved streets.[15]

[13] N.Y. MULTIPLE DWELLING LAW §302 (1946).

[14] See generally, H. W. LAUTNER, SUBDIVISION REGULATIONS 28 (1941).

[15] See, *e.g.*, Maryland-Washington Regional District Subdivision Control Law, Md. Laws 1943, c. 992, §2, as amended.

Several weaknesses appear however in this method of enforcement. One is that the burden of many of the penalties may fall on one of the classes of persons which the subdivision control ordinance is supposed to protect from his own folly. One purpose of such legislation is to protect a buyer from hardship resulting when he improvidently relies on assurances of speculative developers about the nature of the subdivision. Giving this buyer the power to avoid his contract assumes that he has a knowledge of his legal rights after breach which it is assumed he did not have before he purchased, and the power of the city to withhold building permits for buildings on unapproved lots may put the full onus for noncompliance on this same betrayed buyer.[16] To the extent however that the merchandizing of a subdivision requires a developer to market a finished product rather than a vacant lot, the onus of compliance for purposes of building permits is put upon the developer.

A further weakness in this legislation arises from the fact that the territorial limits of the recording office include units of government which have and some which do not have this type of ordinance and there is no effective procedure in most states to bring home to the recorder the idea that in some areas he must not record plats without planning approval and with respect to other areas he may. This has resulted in considerable error on the part of recorders in recording maps which should not be recorded.[17]

Finally the legislation did not clearly establish that title to lots in an unapproved subdivision is unmarketable.

One advantage of this type of legislation is that it appears to be the practice of institutional lenders to insist on proof of compliance with the subdivision law before they will commit themselves to a developer to loan on security of housing constructed in the subdivision. Thus both the Federal Housing Administration and the Veteran's Administration refuse to give a commitment for insured mortgages on property in a new subdivision without proof of compliance with the subdivision laws.[18]

Thus the marketing practice of conveying by reference to a recorded map and the practice of the subdivider obtaining commitments of mortgages for his prospective mortgages tend to insure compliance with the subdivision control laws in urban areas.

C. Violations of Planning Legislation and Marketable Title

If violations of planning legislation render the title defective, we have perhaps the most significant method of private enforcement yet discussed. If such is the rule then we have something which tends to produce some compliance every time the property is sold commercially or a mortgage loan placed on the property.

Does a violation of planning legislation render the title defective? The case

[16] Note, *Wrongful Subdivision Approval by the Plan Commission—Remedies of the Buyer and City*, 29 IND. L. J. 408 (1954); Note, *Land Subdivision Control*, 65 HARV. L. REV. 1226 (1952).

[17] Melli, *Subdivision Control in Wisconsin*, [1953] WIS. L. REV. 389.

[18] INTERNATIONAL CITY MANAGERS' ASS'N, LOCAL PLANNING ADMINISTRATION 255 (2d ed. 1948) reports FHA refuses to issue commitments on houses on unapproved lots. See, *e.g.*, FHA, MINIMUM PROPERTY REQUIREMENTS FOR CHICAGO DISTRICT.

law would seem to answer this question in the affirmative.[19] If a subdivision control law provides that a plat improperly recorded is not a matter of record it would seem that an improperly recorded plat is a matter of title[20] just as absence of a properly acknowledged deed (although recorded) may be a matter of title. Certainly this would seem to be the rule in so far as the vendor's obligation is to convey a record title because absence of a recorded map would mean that the purchaser's title with respect to easements in streets and other public places shown on the map would be unrecorded even though the description of the lot by reference to an unrecorded plat is a sufficient description to convey (as between grantor and grantee).

The *Hocking*[21] case from California does not seem to be contrary to this conclusion. In that case an insured who had purchased a lot in a subdivision as to which the map was erroneously approved by the city council sought to hold his title insurance company on his title policy insuring marketability, after he discovered that in spite of what appeared to be an approved plat, the city officials would not give him a building permit to build on his lots. The majority of the Supreme Court, over a sharp dissent, held that the claim was not covered by the policy. Several grounds not involving our problem were available for the decision. The Court said that under the terms of the policy loss had not been established even though the defect was a matter of title; it said that plaintiff was not really objecting to title but to the quality of the premises. In so far as the majority meant by this that the refusal to issue a building permit was not a defect of title there may be no quarrel with the decision. But as the dissent pointed out there was a title defect if a lot owner purchased a lot which did not face on a public street or appurtenant to which there were easements in his favor not of record.[22] The majority pointed to language in the California statute which seemed to say that if the approval of the city council was endorsed on the map, as it was, the map was "duly recorded,"[23] thus implying that if the map had been unrecorded or recorded without city council approval a title defect would have existed. That part of the statute, not referred to by the majority, giving the purchaser or the government power to cancel the sale would also seem to create a defective title.[24]

An opinion of the Attorney General of Wisconsin[25] seems to hold that a violation of a subdivision control statute does not render the title defective but in Massachusetts the Land Court refuses to register title to lots in an unapproved sub-

[19] See Dunham, *Effect of Violations of Building Covenants and of Zoning Ordinances on Title*, 27 ROCKY MT. L. REV. ——— (1955).

[20] Cleveland v. Bergen Bldg. & Imp. Co., 55 Atl. 117 (N.J. Ct. Ch. 1903); Morris v. Avondale Heights Co., 218 Ky. 356, 291 S.W. 752 (1926). See 3 AMERICAN LAW OF PROPERTY §12.124 (Casner ed. 1952) and cases cited.

[21] Hocking v. Title Insurance & Trust Co., 37 Cal.2d 644, 234 P.2d 625 (1951), commented upon in 4 ANNUAL SURVEY OF CALIFORNIA LAW, 1951-1952 222.

[22] See cases cited in note 20, *supra*.

[23] CAL. BUS. AND PROF. CODE c. 2, art. 10, §11628 (1951).

[24] Clemons v. City of Los Angeles, 36 Cal.2d 95, 216 P.2d 1 (1950). *But cf.* Land Title, C. N. Marques, 37 Hawaii 260 (1945).

[25] 34 OPS. ATT'Y GEN. WIS. 290 (1945).

division.[26] To avoid this doubt clarifying legislation is needed in most states.[27]

"Violations" of official street map ordinances—that is buildings built in the beds of mapped but unopened streets without permit—seem to render the title defective,[28] as do violations of zoning ordinances.[29] Violations of building and housing codes would seem to be in the same category as violations of zoning ordinances, although the New York cases seem to distinguish zoning and restrictive covenant violations from building and housing code violations.[30] However, it appears to be the practice of title companies in New York to report, at the time they prepare a title report, on all uncorrected violations of record in the building department.[31] This would seem to indicate some practice at least treating this type of violation as a matter of title.

While the above may be the result of the cases, this assumes significance for our purposes only if the title examining industry reports these violations as they do the real property tax lien and if those forces in the market interested in the quality of the seller's title take into account violations of planning laws in their own actions. There is very little evidence that the title examining industry and the institutions of the market treat these matters as matters of title.

Abstractors usually examine only the "record title" and lawyers examining abstracts base their opinions only on the record therein disclosed. With the exception of the status of the subdivision map which is a matter of record; building code violations as to which "notices" have been sent and are on file in the office of the building department; and master street plan maps which are on file in some appropriate city office—most violations cannot possibly be said to be a matter of record but are only matters discoverable on some kind of inspection or survey. Surveyors seem to show lot lines and any violation of set-back lines in zoning ordinances on their surveys but do not ordinarily show violations of other bulk restrictions (*e.g.*, height) and never a violation of a use restriction of a zoning ordinance. The usual inspection report seems to be directed to mechanics liens and "possessory" claims and not to obvious violations of planning legislation.[32] Thus, most of the title industry concerned with records, inspections, and surveys do not seem to pick-up violations in these customary title reports.

[26] See MASS. ANN. LAWS c. 41, §81FF (1954 Cum. Supp.). Before this statute clarified the situation there was considerable shock at this conclusion among conveyancers. See Tyler, *Pitfalls in Title Examinations*, 35 MASS. L. Q. 21, 26 (Sept. 1950).

[27] See Mass. Laws 1953, c. 674, §7, amending c. 41, §81, MASS. ANN. LAWS.

[28] Petterson v. Radspi Realty and Coal Corp., 290 N.Y. 645, 49 N.E.2d 615 (1943); Bibber v. Weber, 102 N.Y.S.2d 945 (Sp. Term 1951); Agliata v. D'Agostino, N.Y.L.J., May 6, 1953, p. 1524, col. 1.

[29] Carlish v. Salt, [1906] 1 Ch. 335; Moyer v. De Vincentis Construction Co., 107 Pa. Super. 588, 164 Atl. 111 (1933); Lohmeyer v. Bower, 170 Kan. 442, 227 P.2d 102 (1951).

[30] Woodenbury v. Spier, 122 App. Div. 396, 106 N.Y. Supp. 817 (2d Dep't 1907). See also Millman v. Swan, 141 Va. 312, 127 S.E. 166 (1925).

[31] Speech of William Wolfman, Counsel, New York Title Guaranty & Trust Co., before the Round Table on Property, at the annual meeting of the Association of American Law Schools, in New York City, Dec. 28-30, 1954. In Detroit, notices of violations are now being recorded in the realty records. See *Detroit Hits Code Violators in Pocketbooks With Old Law*, 12 J. HOUSING 61 (1955).

[32] See, *e.g.*, "Certificate of Inspection and Possession" required by Regulations for the Preparation of Title Evidence in Land Acquisition by the United States.

Furthermore, title insurance companies, even those purporting to insure marketability, usually attempt to limit their liability so as to exclude "governmental acts" and the violation thereof.[33]

The American Title Association Loan Policy which is available only to lenders, and is not issued everywhere, purports to be an exceptionless policy but it also excludes from its coverage insurance "against action by any governmental agency for the purpose of regulating occupancy or use of said land or any building or structure thereon." It is not clear, however, that this relieves the title insurance company issuing this policy from liability in the situation where zoning law enforcement proceedings are commenced by private citizens instead of by a governmental agency.

Nor do institutional lenders and their government supervisors insist on the position taken by the cases. As far as is known there are no statutes which expressly make a loan on security of land in violation of planning legislation an ineligible investment for the regulated investor. Neither are there any statutes which in express terms require a marketable title for an eligible investment. The statutes regulating banks, building and loan associations, insurance companies, and other regulated investors require the loan either to be secured by a "first" mortgage (or lien)[34] or to be one on security of "unencumbered"[35] real estate or sometimes require that the security be both a "first lien" and upon "unencumbered real estate."[36] While it has been suggested that this language does not compel the institutional lender to insist on marketable title[37] it is doubtful that this conclusion can be maintained. Unless an "encumbrance" is considered only a monetary lien, those statutes which require unencumbered real estate would clearly make ineligible investments in loans secured by mortgages on land encumbered with easements, encroachments, and other "encumbrances." A violation of a zoning ordinance which subjects the purchaser to the hazards of litigation would seem to be as much an encumbrance as an encroachment. That an encumbrance embraces most of the customary title defects seems to be the common understanding for the word.[38]

The "first lien" statutes present a slightly different problem of construction, however, since technically property subject to an easement of way, for example, could

[33] Thus the title insurance policy in the *Hocking* case, *supra* note 21, excepted from coverage "any governmental act or regulations restricting, regulating or prohibiting the occupancy or use of said land or any building or structure thereon."

But it is reported that some title policies now insure against zoning violations. Henley, *Report of Committee on Standard Forms*, 28 TITLE NEWS 25 (February, 1949).

[34] See, *e.g.*, ILL. REV. STAT. c. 73, §737(1)(e) (1951) (life insurance companies); COL. REV. STAT. §14-1-33 (1953) (banks); OHIO REV. CODE §§1105.19 and 1109.08 (1953) (banks and building and loan associations); MASS. ANN. LAWS c. 168, §54 (savings banks); *Federal Reserve Act*, 38 STAT. 273 (1913), as amended, 12 U.S.C. §371 (1952 Supp.); *Servicemen's Readjustment Act*, 58 STAT. 1291 (1944), as amended, 38 U.S.C. §694 (1952 Supp.).

[35] See, *e.g.*, MASS. ANN. LAWS, c. 175, §63 (1948); N.J. REV. STAT. §17:21-1(c) (1937).

[36] CAL. INS. CODE §1176 (1950); ORE. REV. STAT. §738.250 (1953).

[37] REEVES, GUARANTEEING MARKETABILITY OF TITLES TO REAL ESTATE 118 (1951) (unpublished, for use of Chicago Title and Trust Co.).

[38] Thus many insurance statutes provide that building restrictions, leases, and liens for current taxes are not to be encumbrances within the meaning of the statute. N.Y. INS. LAW §81(6) (1949).

qualify as property on which the mortgage would be a "first lien." But again something more than a technical first lien is the common understanding. Perhaps this results from the fiduciary nature of the investor's duty which presumably requires him to be "prudent" even within the permissible field. Trustees are required by the "prudent" requirement to invest in mortgages on land as to which the title is marketable.[39]

The mortgage industry practice is not clear[40] but tends, as does the policy of the government supervisors,[41] to accept a title insurance policy as complete proof of eligibility of title. The Veterans Administration's regulation under a "first lien statute" best represents the prevailing attitude: title to the mortgaged land satisfies the requirements if it is "acceptable to informed buyers, title companies and attorneys generally in the community in which the property is located."[42]

The practice of two United States government agencies insuring mortgages on urban real estate is revealing in connection with our problem. As indicated earlier both the Federal Housing Administration (FHA) and the Veterans Administration (VA), before they commit themselves to insure loans in a newly established development, do require the applicant (developer or builder) to submit proof of compliance with local subdivision and zoning laws.[43] But this is the practice of neither agency when either old housing or isolated new construction is involved.

Thus, the Solicitor of the VA has ruled that a violation of a zoning ordinance does not destroy eligibility of the security but he admonishes the appraisers to take this into account in valuing the property.[44] In short, the VA, under its statutory authority, limits its function to that of seeing to it that the veteran and the Federal Government get value for their investments; it is not concerned with or responsible to the community in which the veteran purchases.

The FHA operating under a similar type of guaranty legislation seems to draw a line in its regulations between "big" and "little" business. If a developer is seeking approval for loans on housing in a subdivision, on multiple dwellings of twelve or more units under the Section 207 program or on a co-operative housing project (Section 213), proof must be submitted of compliance with local government regulations.[45] If, however, the application is for insurance of a loan on a single one-to-

[39] Gilbert v. Kolb, 85 Md. 627, 37 Atl. 423 (1897); *In re* Roach's Estate, 50 Ore. 179, 92 Pac. 118 (1907).

[40] Letters to the author from general counsel of six large life insurance companies indicate that in loans on new construction five of the six companies check for both building and zoning laws. On old buildings only one checked for zoning and building code violations, and one said their "appraisers" took this into account.

[41] In letters to the author from the Insurance Commissioners of Connecticut, Illinois, New Jersey, and New York only the latter expected the title insurance policy to show zoning violations. Illinois refused even to see a problem as it accepts title insurance as complete proof apparently even for matters against which title insurance does not insure.

[42] 38 CODE FED. REG. §36.4350(1)(a) (Cum. Supp. 1954). This was added June 12, 1950, 15 FED. REG. 4398 (1950).

[43] See note 18 *supra*.

[44] VA SOL. OP. No. 22-49 (1949); *id.*, 186-47 (1947).

[45] Reg. 232 (for Sec. 207 mortgages on multi-family housing), and Reg. 241 (for Sec. 213 mort-

four family unit (Section 203), on an individual dwelling unit in a co-operative project (Section 213), on property in an urban renewal area of a one-to-four family type (Section 220), or for a Title I home improvement loan, the regulations do not require, as a condition of insurance, any proof as to compliance with local planning ordinances.[46] Since the loan is insured, there is of course no incentive on the lender to undertake his own investigation as to such violations. Indeed, most statutes establishing title and other standards for eligible mortgages specifically remove almost all restraints if the VA or FHA insures.[47]

In the light of the purposes of the VA loan system it may not be improper for the VA to ignore local planning; his job was to get the veteran a home—at least the VA can say it was no more than that. But the same cannot be said of the FHA. Almost since the original National Housing Act and at least since the Housing Act of 1949, the Federal Government program of insured loans and grants for housing has had a planning element among its objectives. Since 1949 some kinds of federal aid to municipalities have been conditioned on the performance record of the local community in having adequate planning and enforcement.[48] The 1954 Act requires, as a condition to certain grants, loans, and mortgage insurance, that a city have a "positive" program for prevention of blight and it establishes a new objective—the rehabilitation of older areas of the city.[49] It seems highly indefensible for the FHA, particularly in areas set aside for urban renewal, to require no check on violations caused by home improvements under Title I nor on violations encouraged by liberal loan policies on old one-to-four family buildings. On the one hand, the Housing and Home Finance Administration is chiding cities for not enforcing their planning laws and threatening if they do not improve, to withhold grants in aid necessary to help the cities "renew" or "redevelop" deteriorated parts of the city; but, on the other hand, it is telling local banks and builders that the FHA does not care whether they loan, at government risk, to private owners who illegally convert or repair old buildings, thus adding to the blighted conditions in the very cities the FHA says it is trying to save. Almost the best proof city officials could offer the administrator of the urban renewal program that the city has a workable program to stop blight would be to give him a copy of a memorandum from the administrator of the housing mortgage insurance program instructing

gages on cooperative housing projects). Reg. 280 also provided for proof of zoning compliance in the now expired Sec. 608 program. All of these regulations are in 24 CODE FED. REGS. (Cum. Supp. 1954).

[46] Reg. 221 (for Sec. 203 mortgages on one-to-four family housing); Reg. 243 (for individual mortgages released from lien of cooperative project mortgage); Reg. 261 (for 1-11 family dwellings in rehabilitation area under Sec. 220); and Reg. 201 (alteration, repair and improvement including conversion of existing housing—Title I loans). All are found in 24 CODE FED. REGS. (Cum. Supp. 1954).

It is true however that in Section 203 loans on new construction FHA Manual, Minimum Property Requirements for Properties, specifies that the development shall conform to local zoning, building and construction laws. This is not required for existing construction.

[47] See, *e.g.*, N.Y. INS. LAW §81(6) (1949).

[48] See Title I, Housing Act of 1949, 63 STAT. 413 (1949), as amended, 42 U.S.C. §1441 *et seq.* (1952 Supp.).

[49] Section 303 of Housing Act of 1954, 68 STAT. 623, 42 U.S.C.A. §1451 (1954 Supp.).

lenders and builders that insurance would no longer be available for loans without proof of compliance with most, if not all, local planning laws.

It is no answer to this problem to instruct the appraisers to take "violations" into account in establishing value because often the illegal use is an intensification of use which may well increase the value of the property. Nor is it a defense of the FHA that violations are difficult to police. As a minimum the same kind of certificate or affidavit from the city or local lender as is used in other areas of FHA supervision could be required.[50]

Before this method of enforcement is fully embraced by city planners, some of the possible consequences should be noted. If planning violations are to be made such a title defect that the institutions of the market must take cognizance of such violations, it would seem that these private institutions are entitled to insist on at least three conditions: (1) that there be a machinery available whereby they can obtain from the enforcing officials a definitive statement that there is or is not a violation as of a particular date; (2) a statute of limitations so that if the planning violation is not caught by the city official within a specified time the property is freed from the regulation; and (3) an adequate public record of the violations or restrictions available to title examiners and indexed in a manner to which the examining industry is accustomed.

While there seems to be some statutory development toward imposing a statute of limitations,[51] the present situation is almost intolerable on the other points. In subdivision regulations, for example, state enabling legislation usually authorizes municipalities to impose such regulation on land within its municipal boundaries and sometimes on an extra-territorial area as well. Land records, kept by larger units of government—usually counties—cover both areas without such legislation and areas with it. Under present laws there is nothing in the county office containing the land records to tell the examiner whether a subdivision map on file in that office should have been approved or not, or whether the approval noted thereon was by the proper officials, or whether the officials can go behind their own approval and later upset it.[52] Likewise, municipal offices charged with enforcement of zoning, building codes, and housing laws have in many cities no adequate records of viola-

[50] See, *e.g.*, certificate concerning prevailing wage, 24 CODE FED. REGS. §232.19(d)(4) (Cum. Supp. 1954).

[51] See N.Y. GEN. CITY LAW §35-a (1954 Cum. Supp.): if no action commenced within fifteen years to revoke building permit erroneously issued for building in bed of mapped street, permit is valid. Added by N.Y. Laws 1954, c. 775. See also MASS. LAWS ANN. c. 41, §81Y—one year statute of limitations on proceedings against violation of subdivision law.

[52] In 1953 Massachusetts made provision in its subdivision law for many of these problems. Mass. Laws 1953, c. 674. The subdivision ordinance is not effective until register of deeds is notified of its existence; the Planning Board is required to record its regulations and also to state on request whether a particular area is subject to regulation or not. N.Y. MULTIPLE DWELLING LAW §301(5) (1946) provides that a certificate or record in building department may be relied upon by any good faith purchaser or lender.

In Seat v. Louisville & Jefferson County Land Co., 219 Ky. 418, 293 S.W. 986 (1927) only by taking "judicial notice" of absence of a planning ordinance in Louisville was the court able to determine whether a plat was recorded.

tions and notices which can be checked by the title examiner. Finally, the street plan ordinances, as well as the zoning ordinance, are overly optimistic about future development. There should be some provision, just as there is for restrictive covenants, whereby these ordinances prospective in operation cease to be effective after a period of time if development does not take place.

Up to this point we have been concerned with the existence of an encumbrance at the time of a transfer of some interest in land. The real property tax has an additional impact on title—that tax for any year is by law made a lien senior to that of an earlier mortgage so that a mortgage, an eligible investment when made, may become ineligible by subsequent conduct of the mortgagor. This induces lending institutions to police their mortgagors. Absent a statute making a subsequent violation an encumbrance on the title under a mortgage such a result would not occur with respect to planning violations.

One such attempt was made in the field of planning. New York, on the analogy of taxes and special assessments, attempted to make the city's lien for improvements on private property made by the city in order to bring the building into compliance, senior to existing mortgages. This, if effective, would of course put the mortgagee clearly in the position of being policeman for the city. There would be no constitutional objection to such a statute if it were made applicable only to mortgages executed after its effective date and as to violations thereafter occurring. It was held unconstitutional, however, as to a mortgage which antedated the statute.[53] The court was impressed with the argument that while a mortgagor could avoid the lien as to his interest by closing up the building instead of permitting its repair, the mortgagee had no power to do this until after foreclosure and, in the meantime, an agreement between the city and the mortgagor could subordinate a mortgage to a lien for improvements which would otherwise be junior to the mortgage. Subsequent developments in the constitutional concept of "due process" may have weakened the authority of this case.[54]

Another route to the same end has been suggested in Chicago.[55] In an equity proceeding to abate a nuisance, the petitioner can ask for the appointment of a receiver to abate the nuisance. On appointment, the receiver's obligations incurred in abating the nuisance (making the repairs) would be senior to the lien of the mortgagee.[56] Whenever a violation results in a nuisance, this concept of equity receiverships gives the city an additional weapon to induce the mortgagee to police the management of the property by the mortgagor.

[53] Central Savings Bank v. City of New York, 279 N.Y. 266, 18 N.E.2d 151 (1938), *cert. denied*, 306 U.S. 661 (1938). See Note, 39 COL. L. REV. 889 (1939), for history of this statute.

[54] Thus giving the state a prior lien on railroad property for the railroad's share of the cost of grade-crossing elimination has been upheld against claims under earlier mortgages. New York v. Gebhardt, 151 F.2d 802 (2d Cir. 1945).

[55] 20 OPS. CORP. COUNSEL OF CHICAGO 167, at 174-177 (No. 10099).

[56] JAS. L. HIGH, A TREATISE ON THE LAW OF RECEIVERS §796 (3rd ed. 1894); 1 POMEROY, EQUITABLE REMEDIES §220 (1905). Cf. New York Dock Co. v. Steamship Poznan, 274 U.S. 117, at 121 (1927); Attorney General v. Vigor, 11 Ves. 563, 32 Eng. Rep. 1207 (Ch. 1805).

II

ENFORCEMENT BY DIRECT ACTION BY PRIVATE PERSONS

The most frequently thought of method of enforcement other than public enforcement is private action by a private citizen to compel a violator of planning laws to comply. This method may be authorized in the enabling legislation[57] or may be available by application of equity principles.

If the planning legislation declares a violation to be a "public nuisance" this neither detracts from, nor adds to the power of the citizen to seek an injunction against the same violation. Neither does the equity maxim that it will not enjoin violation of the criminal law detract from whatever right the plaintiff has. Absent express statutory authority, the right of a private citizen to seek an injunction against a violator of city planning is based on the theory of private nuisance—*i.e.*, action of the defendant which has caused "special damage" to the plaintiff.

On this theory it is difficult to imagine a situation where private enforcement of subdivision control law or the master street plan could be obtained.[58] With respect to zoning, the case law fairly consistently permits a neighboring property owner to seek an injunction against violation of the zoning ordinance.[59] The problem for the plaintiff, in any type of planning legislation, is that of establishing "special damage" different from damage to the public generally. Sometimes this issue is avoided by the court saying that the zoning ordinance was passed for the benefit of the neighboring property owner or that there is a presumption of "special damage" to neighboring property owners.[60] This avoids the question whether the damage to the plaintiff must be different in kind or only in degree from that suffered by the public at large since it is well established that a private citizen cannot compel compliance with a law to protect himself from damage which he suffers as a member of the public. Since one of the major objectives of a zoning ordinance is to prevent commingling of "incompatible" uses it is not difficult for the plaintiff to establish some special damage arising from proximity.[61] This is more difficult, in theory, where the objective of the zoning ordinance is something other than orderliness of uses. Thus it might be difficult for a neighboring property owner to enjoin a violation of a section of the zoning ordinance whose objective is to control the intensity of the use of the city's services. However, the case law has not drawn this fine a line in most states and if the plaintiff's property is near the defendant's he is permitted to enjoin the violation almost on that fact alone.

A much more difficult question is private enforcement of housing and building

[57] See, *e.g.*, OHIO. REV. CODE §303.24 (1953); ILL. REV. STAT. c. 24, §73-9 (1953).

[58] Massachusetts has given ten taxpayers the right to enforce subdivision control laws. MASS. ANN. LAWS c. 41, §81Y (1952).

[59] The leading case is Welton v. 40 E. Oak St. Bldg. Corp., 70 F.2d 377 (7th Cir. 1934), *cert. denied*, 293 U.S. 590 (1934). See 2 E. C. YOKLEY ZONING LAW AND PRACTICE §192 and cases cited (2d ed. 1953); 8 MCQUILLIN, MUNICIPAL CORPORATIONS §25.343 (3d ed. 1950).

[60] Welton v. 40 E. Oak St. Bldg. Corp., *supra* note 59.

[61] See Note, *Injunction, Right to Maintain Action for Violation of Zoning Ordinance*, 21 B.U.L. REV. 556 (1941).

codes. Much, if not most, of the provisions of this type of law are designed to protect the health and safety of occupants of the buildings regulated. While such occupants might have the benefit of the special damage rule as applied in the zoning cases, there would be no presumption of special damage entitling the neighboring property owners to seek an injunction. Occasionally a section of the building code, such as the prevention of wooden buildings in certain fire districts, is said to be for the protection of neighboring properties and a private injunction is allowed.[62]

Yet it is the enforcement of these codes which mean so much to stabilization and protection of neighborhoods under any kind of neighborhood conservation program. On analysis it would seem that the problem of private enforcement of these laws is not that of establishing special damage to the plaintiff differing from that suffered by the public but is rather that of establishing a kind of damage recognizable in the law of nuisance. Basically what the neighboring property owner is asserting is that a violation of these codes by the defendant so deteriorates the neighborhood that the violation adversely affects his property values and the satisfactions and enjoyment which having property in this neighborhood gives him. Is this recognizable damage?

The right to be protected in a private nuisance action is the right to quiet and undisturbed enjoyment of neighboring property. If the defendant's conduct impairs the health and comfort of the possessor (*e.g.*, smoke, dust, odor, noise, light, heat), the conduct is easily held to be a nuisance. But in our situation the plaintiff's hurt is analogous to that suffered in the cases dealing with the funeral home, cemetery, bawdy house, contagious disease hospital, and the junk yard as a nuisance.[63] In planning cases the defendant's conduct rarely affects plaintiff's health or safety—it reduces the satisfactions which he obtains from his own property. Courts have been hesitant in permitting this kind of damage to support a nuisance action, partly out of fear of protecting an unusually sensitive plaintiff against what appears to be reasonable conduct of the defendant and partly out of the difficulty of weighing the relative merit of defendant's and plaintiff's socially desirable uses. Here there can be no doubt as to the unreasonableness of the defendant's conduct and of its non-utility to the public; the public has declared that it does not want defendant's activity to occur, or at least to occur where it is. The court could reduce its worry about protecting super-sensitive plaintiffs if it would make use of the readily available evidence of the extent of the plaintiff's attitude among the public generally. For, if the public generally shares the plaintiff's satisfactions from land use, then the demand for the plaintiff's property in the market will decline and the value of his property will be reduced; if on the other hand there is little agreement with the plaintiff's position, the effect on property values will be much less. If then the plaintiff can establish that defendant's conduct in violating the housing and

[62] People's Gas Co. v. Tyner, 131 Ind. 277, 31 N.E. 59 (1892); Kaufman v. Stein, 138 Ind. 49, 37 N.E. 333 (1894). See 1 POMEROY, EQUITABLE REMEDIES §478 (1905).

[63] On nuisance generally, see VI-A AMERICAN LAW OF PROPERTY §28.25 (1954); Comment, 26 MICH. L. REV. 942 (1928).

building code is tending to deteriorate the quality of the neighborhood, he should be entitled to his private action to enforce the codes.

This method of private enforcement has one major disadvantage—equity proceedings are very expensive in most states. If the plaintiff-citizen prevails, he will be awarded some costs but these do not include attorney's fees.[64] The field of "housing" offers evidence of two methods with which to meet this practical problem.

The first is to award attorney's fees to the successful plaintiff. In 1953 the Illinois legislature, as part of its urban conservation program, authorized the court to award reasonable attorney's fees incurred in the successful prosecution of an injunction against violation of zoning laws.[65] The Illinois statute is of limited utility because it applies only to zoning, but it is shrewd in conception because it enlists the aid of another private enforcement group—the legal profession.

The second solution to the problem of costs of private injunction actions is to permit the action to be brought by an association or group rather than an individual. Thus, the Housing Act of 1954 prohibiting property on which there is an insured loan to be used for hotel purposes provides in a new section 513[66] of the National Housing Act that "any person owning or operating a hotel" within a specified distance from the violating property or "any group or association of hotel owners or operators" within the same area may bring a suit in federal court without regard to diversity of citizenship to enjoin violation of the insured mortgagor's commitment to FHA and the insured mortgagee. Permitting a neighborhood association to assume responsibility for the suit relieves the property owner of problems of both cost and time. Perhaps a Society for Prevention of Cruelty to Neighborhoods is needed as much as a Society for the Prevention of Cruelty to Animals.

One additional advantage of private actions of this type should be noted. Once the action is commenced, a *lis pendens* may be filed,[67] and this is clearly an encumbrance on the title which the title examining industry understands and checks for.

III

ENFORCEMENT BY MEANS OF INITIATION OF PUBLIC PROSECUTIONS BY PRIVATE PERSONS

Of course, one of the most common methods of both public and private enforcement is complaint to the public officials by a private citizen followed by appropriate proceedings initiated by the public agencies. Sometimes the private citizen can do more than this—he may set the official machinery into motion. Thus, he may on occasion be able to bring mandamus against an official to compel him to enforce the planning laws. It would seem that the basis of such an action is substantially the same as the basis of the private injunction mentioned above.[68]

[64] *But cf.* Walter v. Danisch, 133 N.J.Eq. 127, 29 A.2d 897 (Ct. Err. & App. 1943) where plaintiff was awarded attorney's fees on an award of a mandatory injunction.

[65] ILL. REV. STAT. c. 24, §73-9; Ill. Laws 1953, p. 431 (H.B. 609).

[66] 68 Stat. 610, 12 U.S.C.A. §1731b(i) (1954 Supp.). See also Massachusetts statute referred to in note 58, *supra*.

[67] Penataquit Ass'n v. Furman, Sup. Ct. Suffolk Co., N.Y.L.J. Nov. 10, 1953, p. 1407, col. 1.

[68] Reem v. Daves, 31 Idaho 730, 175 Pac. 959 (1918) (mandamus to compel city to order demoli-

In some cities, depending on the wording of the local charter or statute, the private citizen may bring an information against the violator (where violation is a misdemeanor) in the name of the city, alleging violation of law.[69] Further restrictions may be imposed by court rules that if a complaint is made by a private citizen, he must swear to the truth of his complaint and cannot allege a violation on information and belief.[70] While this seems a necessary check on "unfounded" and "spite" complaints, it seriously limits the use of this remedy in connection with most planning legislation, particularly housing and building codes.

CONCLUSION

Private enforcement is an oft-overlooked vehicle for harassed residents witnessing the decline of their neighborhood through the indifference and inability of city officials towards enforcement of the planning laws; it is also an oft-overlooked remedy for the harassed city official who does not have the staff to engage in systematic and regular enforcement through the usual penalty procedure. Under laws as described above the city official may, by cooperative arrangements with insurance companies and mortgagees, obtain their aid in enforcing some types of planning laws. Private enforcement could be strengthened if statutory changes clearly made violations a matter of title and a basis for ineligibility of mortgage investment by institutional lenders.

Perhaps one reason for not making greater use of these private means of enforcement is a hostility against private citizens turning "policeman." It is submitted that planning is a peculiarly bad area for this attitude to dominate. The attitude reflects a public belief that these measures are "police" measures designed to preserve the peace of the community. Since a major objective in all planning legislation is to regularize land use in order to preserve certain values economic and otherwise in the area affected, planning is a peculiarly appropriate place for community satisfactions in property ownership to express themselves. If the residents and property owners of any area are not concerned about the protection of their own neighborhood, there are few reasons which can be advanced as to why the city official should be interested.[71]

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tion of building built in violation of ordinance); Garrou v. Teaneck Tryon Co., 11 N.J. 294, 94 A.2d 332, 35 A.L.R.2d 1125 (1953) and Annotation.

[69] McQUILLIN, *op. cit. supra* note 59, §27.08. The Illinois Cities and Villages Act (ILL. REV. STAT. c. 24, §10-8 (1951)) provides: "A warrant for the arrest of an accused person may issue upon the affidavit of any person that an ordinance has been violated; and that the person making the complaint has reasonable grounds to believe that the party charged is guilty thereof." In City of Spokane v. Robison, 6 Wash. 547, 33 Pac. 960 (1893) an information was filed by a private citizen complaining of a violation of the slaughterhouse ordinance. This method of beginning was upheld even though the City Charter provided that the City Attorney should conduct all prosecution. Contra: City of New Rochelle v. Beckwith, 268 N.Y. 315, 197 N.E. 295, 100 A.L.R. 991 (1935) (zoning ordinance). *But cf.* Marcus v. Village of Mamaroneck, 283 N.Y. 325, 28 N.E.2d 856 (1940).

[70] See, *e.g.*, Municipal Court Act of Chicago §27 (ILL. REV. STAT. c. 37, §382). The Corporation Counsel of Chicago has ruled the section referred to in note 69 is controlling of this section. 21 OPS. CORP. COUNSEL OF CHICAGO 384 (1944).

[71] *But cf.* INTERNATIONAL CITY MANAGERS' ASS'N, LOCAL PLANNING ADMINISTRATION 247 (2d ed. 1948).

Moreover, as Professor Ratcliffe pointed out in the article referred to at the beginning of this paper,[72] if city planning is to affect city growth and development, it must be because controls are imposed on market forces or its institutions subjected to pressure. What better way to affect the market than to make use of factors already affecting the free market—the lending and title examining institutions, and the attitudes of buyers and sellers and users of land?

[72] See note 1, *supra*.

MUNICIPAL ECONOMY AND LAND USE RESTRICTIONS

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INTRODUCTION

The problem of maintaining a sound relationship between municipal development and the local budget was again brought to the foreground in the recent case of *Beach v. Planning and Zoning Commission of Milford*.[1] The planning officials of Milford, Connecticut, had denied a property owner permission to subdivide his land on the grounds that the fire and police protection and school facilities which would be demanded by the increase in population in that area could not be furnished at that time in view of the community's financial condition. The Connecticut Supreme Court of Errors overruled this action on the narrow ground that the enabling act did not provide for those reasons as a basis of subdivision control. This problem has been especially acute during the period since World War II with the shift of urban population to the more rural areas of the larger municipalities, or to the smaller outlying communities. The community is faced with increased costs in maintaining schools and other public services. To offset this expenditure it must rely on the tax base of the property which is developed as a result of this shift in population and on the tax base of existing property. The former tax base should be at its optimum and the latter preserved. Haphazard development in the process of the community's growth may well result in neither and in unduly large expenditures. Land use restrictions are the community planner's primary tools with which he attempts to maintain this local economy.

Land use restrictions have been upheld as measures within the scope of the police power.[2] The traditional concept of this power is that the state may impose reasonable restrictions upon individual freedom for the benefit of public health, safety, morals, and general welfare. While the concept has not been given a static definition, it has been carefully circumscribed by the courts.[3] However, during the last half century the courts have tended to add "general prosperity" to the usual phrases mentioned. The Supreme Court of the United States stated, "We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the

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[1] 141 Conn. 79, 103 A.2d 814 (1954).

[2] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). For a brief discussion of the development of police power see HAROLD L. REEVE, THE INFLUENCE OF THE METROPOLIS ON THE CONCEPTS, RULES AND INSTITUTIONS RELATING TO PROPERTY c. II (1954) (a paper prepared for the Bicentennial Celebration of Columbia University).

[3] See REEVE, *op. cit. supra* note 2.

public health, the public morals or the public safety."[4] Since then many state courts in reviewing or adjudicating rights involving land use restrictions have declared general prosperity to be within the scope of police power.[5] In Wisconsin the court said that "If such regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare."[6] The New York Court of Appeals in *Wulfsohn v. Burden*[7] was also among the first state courts to follow the federal expansion of police power. That court stated that "Changing economic conditions . . . may make necessary or beneficial . . . public regulation."[8] However, because an objective may in principle justify the exercise of police power does not mean that the methods used are proper in a given case—the regulation, in the field of land use restrictions, must be reasonable as applied to the property which is restricted.[9] This paper will be focused on the question of the extent to which communities may utilize the police power to ease the financial burdens which result from the shift in population.

ZONING

In its earlier years zoning was hailed for its effect in stabilizing and even increasing property values.[10] However, this acclamation died as the method was used, and finally people working in the field admitted it to have a negligible effect in terms of finance, except perhaps at the most highly restricted residential level.[11] The explanation for the former view may be that at the time one could generally perceive little more than the initial impact of zoning with which some change or arrest might be expected. But this impact could have little predictive value as to how zoning would operate in this country over a period of time.

The courts have been of little help to the planner in his attempt to bring zoning to the aid of the municipal coffers. Attempts to use it to economize municipal expenditures were defeated by early New Jersey decisions such as *Ingersoll v. Village of South Orange*.[12] These cases consistently held that inability to supply such public

[4] Chicago, B. & Q. Ry. v. Illinois *ex rel.* Drainage Comm'rs, 200 U.S. 561, 592 (1906). See Bacon v. Walker, 204 U.S. 311, 317 (1907).

[5] See, *e.g.*, Miller v. Board of Public Works of City of Los Angeles, 195 Cal. 477, 485, 234 Pac. 381, 383 (1925), *appeal dismissed*, 273 U.S. 781 (1927); Devaney v. Board of Zoning Appeals of City of New Haven, 132 Conn. 537, 539, 45 A.2d 828, 829 (1946); Schmidt v. Board of Adjustment of City of Newark, 9 N.J. 405, 415, 88 A.2d 607, 611 (1952); Clifton Hills Realty Co. v. City of Cincinnati, 60 Ohio App. 443, 449, 21 N.E.2d 993, 997 (1938).

[6] State *ex rel.* Carter v. Harper, 182 Wis. 148, 158, 196 N.W. 451, 455 (1923).

[7] 241 N.Y. 288, 150 N.E. 120 (1925).

[8] 241 N.Y. at 299, 150 N.E. at 123. See Mansfield & Swett, Inc. v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (Sup. Ct. 1938).

[9] See Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[10] See LAWSON PURDY AND OTHERS, ZONING AS AN ELEMENT IN CITY PLANNING, AND FOR PROTECTION OF PROPERTY VALUES, PUBLIC SAFETY, AND PUBLIC HEALTH 7, 39, 43 (1920).

[11] See Feiss, *Zoning as a Positive Instrument of Planning*, NATIONAL CONFERENCE ON PLANNING 275, 276-77 (A.S.P.O. 1946).

[12] 3 N.J. Misc. 335, 128 Atl. 393 (Sup. Ct.), *aff'd*, 102 N.J.L. 218, 130 Atl. 721 (1925). See Karke Realty Associates v. Mayor and Aldermen of Jersey City, 104 N.J.L. 173, 139 Atl. 55 (1927); E. & M. Land Co. v. Board of Adjustment of Newark, 4 N.J. Misc. 467, 133 Atl. 413 (Sup. Ct. 1926);

services as fire-fighting equipment and personnel was no ground for zoning restrictions; the city had a duty to furnish the services as it expanded. These decisions seemed to have influenced other jurisdictions.[13] However, even at that time they were considered not to impose an unlimited duty on the city to supply fire protection for any amount of fire hazard that a landowner might create,[14] and the building code was to some extent effective in securing protection from fire hazards.[15] An indirect effect of fire hazard prevention is reduction of municipal expense, but the action is justified on grounds of public safety.

Even after the amendment to the New Jersey Constitution in 1927 validating zoning, the *Ingersoll* case was cited with approval,[16] thus indicating that finances did not come within the scope of police power. Zoning would be a relatively ineffectual tool for planners if these early decisions were rigidly adhered to and the municipality were required to justify ordinances on a narrow view of public health, safety, morals, and welfare. Later decisions seem to have recognized this and have begun to indicate that "physical, economic, and social" conditions are proper factors to be considered in determining the most appropriate use of property and justifying the exclusion of industry from residential communities.[17] However, the scope of consideration given to the economic factors appears limited in New Jersey by *De Mott Homes at Salem, Inc. v. Margate City*.[18] There the court held invalid an amendment to a zoning ordinance restricting the plaintiff's property to single family dwellings, on a finding that the motivation behind the ordinance was fear of increased burdens on schools and public services with insufficient return in the form of taxes from the plaintiff's land to meet the expenditures.[19] The case, however, has been distinguished as involving spot zoning discriminating against the property owner.[20] Perhaps the clearest declaration by the New Jersey courts is found in *Springfield Tp. v. Bensley*[21] where the proposition found in the early *Ingersoll* case was reiterated with vigor. The court said that it was "not concerned with the economics involved in the performance of the duty resting on the municipal authorities to

Michel v. Village of South Orange, 4 N.J. Misc. 302, 132 Atl. 337 (Sup. Ct. 1926); Rudensey v. Board of Adjustment of Town of Montclair, 4 N.J. Misc. 103, 131 Atl. 906 (Sup. Ct. 1926); Eaton v. Village of South Orange, 3 N.J. Misc. 956, 130 Atl. 362 (Sup. Ct. 1925).

[13] See City of Youngstown v. Kahn Bros. Building Co., 112 Ohio St. 654, 148 N.E. 842 (1925).

[14] Caldwell v. Saul, 5 N.J. Misc. 165, 135 Atl. 691 (Sup. Ct. 1927).

[15] See, *e.g.*, Harrison v. Board of Adjustment of Town of Montclair, 6 N.J. Misc. 570, 142 Atl. 353 (Sup. Ct. 1928); Contras v. Mayor and Aldermen of Jersey City, 5 N.J. Misc. 59, 135 Atl. 472 (Sup. Ct. 1926).

[16] Hirschorn v. Castles, 113 N.J.L. 277, 174 Atl. 211 (Sup. Ct. 1934).

[17] Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949). See Matter of Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, 252 N.Y. Supp. 178 (2d Dep't 1931), *aff'd*, 261 N.Y. 506, 185 N.E. 714 (1933).

[18] 136 N.J.L. 330, 56 A.2d 423 (Sup. Ct. 1947), *aff'd*, 136 N.J.L. 639, 57 A.2d 388 (1948).

[19] 136 N.J.L. at 334, 56 A.2d at 426.

[20] Guaclides v. Borough of Englewood Cliffs, 11 N.J. Super. 405, 78 A.2d 435 (App. Div. 1952). Ridgefield Terrace Realty Co. v. Borough of Ridgefield, 136 N.J.L. 311, 55 A.2d 812 (Sup. Ct. 1947) was distinguished on the same grounds in *Guaclides*. In the *Ridgefield* case the court refuted the community's argument that the proposed apartment houses would overtax the schools and other public services.

[21] 19 N.J. Super. 147, 88 A.2d 271 (Ch. 1952).

furnish required facilities as and when and to the extent needed. The duty is paramount."[22] Weight given to economic factors has not invalidated zoning ordinances where the ordinance may be justified on other grounds,[23] or rendered illegal action denying an application for a variance.[24]

Most enabling acts have a provision similar to that found in the New Jersey statute which requires that zoning regulations be made "with a view of conserving the value of property and encouraging the most appropriate use of land. . . ."[25] This provision is relied upon by cases permitting some consideration of economic factors. It would aid the planner at least to the extent that zoning for the most appropriate use of property and enforcing a uniform use for the particular neighborhood is effective in decreasing the loss of property value and thus maintaining the tax base. The grant of power is a negative one, however, for courts have held invalid attempts to use it to enhance the value of property and in that way to increase revenue.[26] One could have little quarrel with this result as a matter of statutory construction. If the enabling act expressly provided for the enhancement of value there is some language indicating that zoning regulations enacted pursuant to the provision might be sustained.[27] However, even then the regulation must pass the test of reasonableness to be upheld as a valid exercise of police power. Use of zoning to set up minimum values for buildings[28] or to maintain a low tax rate or to exclude the conservative spender from the community[29] has not been encouraged by the courts.

Those jurisdictions refusing to sustain zoning ordinances based upon economic considerations might rule differently under the Illinois enabling act which empowers municipalities to zone "To the end . . . that the taxable value of land and buildings throughout the municipality may be conserved. . . ."[30] The statute further provides that in enacting all ordinances "due allowance shall be made for existing conditions,

[22] 19 N.J. Super. at 158, 88 A.2d at 277.

[23] Greenway Homes v. Borough of River Edge, 137 N.J.L. 453, 60 A.2d 811 (Sup. Ct. 1948); Putney v. Township of Abington, 176 Pa. Super. 463, 108 A.2d 134 (1954).

[24] See Shipman v. Town of Montclair, 16 N.J. Super. 365, 370, 84 A.2d 652, 654 (App. Div. 1951).

[25] N.J. STAT. ANN. §40: 55-32 (1940). See, *e.g.*, N.Y. GEN. CITY LAW §20(25); MICH. STAT. ANN. § 5.2931 (1949).

[26] 122 Main Street Corp. v. City of Brockton, 323 Mass. 646, 84 N.E.2d 13 (1949); Brown v. Board of Appeals of City of Springfield, 327 Ill. 644, 159 N.E. 225 (1927).

[27] See Putney v. Township of Abington, *supra* note 23, at 108 A.2d at 138. The Alaska enabling act provides that the regulations be made with a view to enhancing the value of property. ALASKA COMP. LAWS ANN. § 16-1-35 (1949).

[28] See Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1055 (1953).

[29] See Simon v. Town of Needham, 311 Mass. 560, 565-66, 42 N.E.2d 516, 519 (1942). But see Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951). The court there upheld an amendment to the zoning ordinance, the enactment of which was motivated by a finding of need for housing and a desire to relieve the tax burden of the small home owner.

[30] ILL. ANN. STAT. c. 24, § 73-1 (Supp. 1954). See Gill, *Minimum Height Restrictions in Brockton*, in MUNICIPALITIES AND THE LAW IN ACTION, PROCEEDINGS OF THE 1946 ANNUAL CONFERENCE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS 250, 255 (Rhyne ed. 1947). He suggests that under this provision there is more likelihood of the courts' sustaining minimum height restrictions. But see Brown v. Board of Appeals of City of Springfield, 327 Ill. 644, 159 N.E. 225 (1927).

the conservation of property values, the direction of building development to the best advantage of the entire municipality and the uses to which the property is devoted at the time of the enactment of such an ordinance."[31] Again it is to be noted that the statute provides for the conservation and not the enhancement of value. The Illinois Supreme Court has given effect to the provision that conservation of the aggregate taxable value of property in the community is a goal of zoning. The provision seems intended for the benefit of the municipal unit. The court sustained a zoning ordinance under which the attacking owner's property was worth 50 per cent less than it would have been under the use to which the owner sought permission to change it.[32] In that case the city introduced evidence to the effect that loss in value of the neighboring property and thus of tax revenue to the city would outweigh any possible gain to the attacking property owner. The petitions of neighboring residential property owners that the use be allowed were held not to alter the case. In fact, the court has stated that preventing loss of taxable value alone would be sufficient basis for an ordinance.[33] The provision that in enacting all ordinances due allowance be made to conservation of property values would seem intended for the benefit of individual property owners. The court has recognized the right of the individual by holding invalid an amendment to a zoning ordinance upon a showing by owners of property adjacent to the rezoned district that due allowance was not made.[34] Such a distinction between the parties intended to be benefited by the two provisions in the Illinois statute has the advantage of not imposing a strict duty upon the city of maintaining the taxable value of all property. In view of possible conflict between the various purposes of zoning stated in enabling acts, the municipality would seem to be in the best position to determine which purpose is most beneficial to it at a given time. Some jurisdictions hold that the economic consequences to the city flowing from a change to a less restrictive ordinance involve questions of policy and business judgment committed to the "honest judgment" of community officials.[35]

Enabling acts containing only the provision that zoning regulations be made with a view of conserving property values leave vague standards for determining the identity of the party intended to be benefited. The community may prevail over the property owner in causing a loss of property value so long as the end is within the scope of the police power and reasonable. A landowner is protected by the fact that the conservation of his property value is usually to the benefit of the municipal

[31] ILL. ANN. STAT. c. 24, § 73-1 (Supp. 1954).

[32] Dunlap v. City of Woodstock, 405 Ill. 410, 91 N.E.2d 434 (1950). The same provision of the statute was held to negate a showing that a single family residence zoning ordinance was unreasonable as to plaintiff's property when the defendant city introduced evidence that the use of plaintiff's property as a multi-family residence would depreciate neighboring property value and diminish tax revenue. Jacobson v. Village of Wilmette, 403 Ill. 250, 85 N.E.2d 753 (1949).

[33] Neef v. City of Springfield, 380 Ill. 275, 281, 43 N.E.2d 947, 950 (1942). The plaintiff property owner attempted to have zoning of his property changed from residential to allow construction of a gasoline station. There were other grounds on which the ordinance could have been sustained.

[34] Michigan-Lake Building Corp. v. Hamilton, 340 Ill. 284, 172 N.E. 710 (1930).

[35] Hendlin v. Fairmount Const. Co., 8 N.J. Super. 310, 72 A.2d 541 (Ch. 1950).

budget. The taxable revenue to be derived from the property is in direct proportion to the value of the property. However, a particular landowner would not be protected if a city empowered to zone with a view to raising revenue does so by extending a manufacturing district in such a way that residences in a neighboring residential district depreciate in value. A zoning change from residential to industrial has been sustained where it was found that a buffer area prevented depreciation of residential property, that the land changed could not economically be used as residential property, and that there was a comprehensive plan. The court stressed the resulting tax benefit to the town and the smaller demand for schools and public services than would have been created had a residential development been fostered.[36] However, where there would be depreciation of nearby residential property and the owner of the rezoned property could have economically continued the original use, it is doubtful that fiscal considerations alone would have justified the rezoning.[37]

Municipalities have recently found some aid in combating haphazard growth of their fringe areas in minimum lot size and minimum floor area restrictions. The former is perhaps the more effective in terms of controlling rapid development of particular districts and perhaps the one more often recognized by the courts. In 1942, the Massachusetts court upheld a minimum lot size requirement of one acre for single family dwellings.[38] There the court noted that "The expense that might be incurred by a town in furnishing police and fire protection, the construction and maintenance of public ways, schoolhouses, water mains and sewers and other public conveniences might be considered as an element more or less incidently involved, in the adoption of a zoning by-law that will promote the health, safety, convenience, morals or welfare of the inhabitants of the town without imposing any unreasonable and arbitrary burden upon the landowners."[39] This would seem another indication that although municipal finances alone may not serve as a basis for zoning restrictions, they may be considered as one of the factors in the over-all formulation of zoning policy.[40] The court indicated that this type of zoning could not be used to maintain a low tax rate.[41] Since then a minimum lot restriction as high as five acres per residence has been upheld as furthering "the advancement of a community as a social, economic and political unit. . . ."[42] The Missouri Supreme Court up-

[36] Hills v. Zoning Commission of Town of Newington, 139 Conn. 603, 609, 96 A.2d 212, 215 (1953).

[37] See Lippow v. City of Miami Beach, 68 So.2d 827 (Fla. 1953). The court stated that stabilization and enhancement of property values in a particular district would not in itself be sufficient to justify the zoning ordinance.

[38] Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516.

[39] 311 Mass. at 565, 42 N.E.2d at 519.

[40] But see Appeal of Elkins Park Improvement Ass'n, 361 Pa. 322, 327-28, 64 A.2d 783, 785 (1949). The court in overruling refusal of a variance from a 7500 square feet per family restriction stated that fear of financial burdens in providing for maintenance of schools and police protection was not a controlling consideration in the case.

[41] Simon v. Town of Needham, 311 Mass. at 566, 42 N.E.2d at 519.

[42] Fischer v. Bedminster Tp., 11 N.J. 194, 203, 93 A.2d 378, 382 (1952). See Dilliard v. Village of North Hills, 276 App. Div. 969, 94 N.Y.S.2d 715 (2d Dep't 1950) (two acre minimum upheld;

held a three acre minimum restriction where the attacking property owner's land adjoined land in other villages zoned for similar lot sizes.[43] The city defended the ordinance on the ground that smaller lot sizes would cause an increase in population which would unbalance the plan for schools, improvements, and fire and police protection to be made in accordance with zoning recommended by city planners.[44] In view of these facts the court thought that the exclusion of the plaintiff's property from the ordinance would disrupt the general zoning planned for the benefit of the community.

Minimum lot size zoning can be sustained as a regulation of population density when done in accordance with a comprehensive plan—a purpose common to most enabling acts.[45] These ordinances imposing minimum lot sizes of one to two acres are fairly easily justified on grounds of public health, safety, and general welfare. Because of this some cities have used the device to prevent overcrowded developments yielding insufficient tax return for the services which would have to be supplied, where the city would not be able to justify zoning on the grounds of municipal economy.[46] However, in using this device to control future development the community must be prepared to show that the time of anticipated residential use of the land can be fixed with some degree of certainty and that the property is suitable for the use zoned. Otherwise the ordinance may well be struck down as an unreasonable restriction.[47] This consideration may cause doubt as to the propriety of highly restrictive zoning at fringe areas of the community, where to the present time little development has taken place. Development at the fringe areas still at great distances from previously built-up sections of the community would not seem to alter the problem greatly when the community attempts to zone under the traditional concept of police power. However, if police power were held to include protection of municipal finances the problem might be to some extent eliminated. The city might be able to show that regulation has a more substantial relationship to the municipal economy than it would have to the traditional concepts of police power.

Minimum floor area restrictions were upheld by the New Jersey court in *Lionshead Lake, Inc. v. Township of Wayne*.[48] The court noted that without this type of restriction there would be danger of the lakes in the area attracting summer visitors who would erect buildings of such inferior quality that the general value

however, here the plaintiff had purchased the property with knowledge of the ordinance and had sold 4 of the 48 acres for more than half the purchase price). In Gignoux v. Village of Kings Point, 199 Misc. 485, 99 N.Y.S.2d 280 (Sup. Ct. 1950), the court upheld an amendment changing the minimum restriction from 20,000 square feet to 40,000 square feet per dwelling.

[43] Flora Realty & Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952), *appeal dismissed*, 344 U.S. 802 (1952).

[44] 362 Mo. at 1036-37, 246 S.W.2d at 776.

[45] *E.g.*, ME. REV. STAT. c. 91, §93 (1954).

[46] Interviews with city planning officials.

[47] See Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E. 2d 587 (1938); Forde v. City of Miami Beach, 146 Fla. 676, 1 So.2d 642 (1941).

[48] 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).

of property would decrease and result in large loss to the permanent residents of the area.[49] This type of zoning has not met with the same extent of judicial approval as have minimum lot size restrictions.[50] In *Medinger Appeal*[51] the Pennsylvania Supreme Court recently said "We therefore hold that neither aesthetic reasons nor the conservation of property values or the stabilization of economic values in a township are, singly or combined, sufficient to promote the health or the morals or the safety or the general welfare of the township or its inhabitants or property owners within the meaning of the enabling Act of 1931, as amended, or under the Constitution of Pennsylvania."[52] Although the Pennsylvania enabling act does not specifically provide for preservation of property value, it does authorize regulation and restriction of building size and height as well as of density of population "For the purpose of promoting health, safety, morals, or the general welfare of townships. . . ."[53] If the court had not been disposed to construe zoning legislation strictly, it might be argued that conservation of property value is an element of "the general welfare."[54]

While minimum floor area restrictions have the advantage of not being subject to the objection that a landowner is deprived of his right to build because his lot size is too small,[55] they have been attacked as economic segregation and as designed for the purpose of protecting high cost buildings.[56] The attack has been countered with the suggestion that one should not be shocked by this fact because zoning in many cases results in ecomonic segregation. An example offered is the economic hardship imposed on property owners who would derive income from their houses if they were zoned multi-family rather than single residence or if zoning allowed a store in part of their homes.[57] Once it is established that preservation of property values is a proper basis of zoning, it would seem that the next question is whether the particular restriction imposed is related to that purpose and whether the exercise of the power in a given case is reasonably calculated to effect that goal.[58] If a district has developed to some extent with high cost houses, zoning with minimum

[49] 10 N.J. at 175, 89 A.2d at 698.

[50] See Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1059 (1953) and cases there cited.

[51] 377 Pa. 217, 104 A.2d at 118 (1954).

[52] 377 Pa. at 226, 104 A.2d 122.

[53] PA. STAT. ANN. tit. 53, §19092-3101 (Supp. 1953).

[54] See Schloemer v. City of Louisville, 298 Ky. 286, 289, 182 S.W.2d 782, 784 (1944). The court said that preventing a decrease in the value of neighboring property was directly related to public welfare. The Kentucky enabling act, however, did provide that zoning be done with a view of conserving property value. KY. REV. STAT. ANN. §100.066 (1943).

[55] See Babcock, *Classification and Segregation Among Zoning Districts*, 1954 U. ILL. LAW FORUM 186, 197.

[56] See Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954). Professor Haar is of the opinion that sliding scale minimum floor areas for different districts tailored to various land uses smack even more of economic segregation. He notes that the Pennsylvania court recognizes that here health justification is no longer present, for it is difficult to say that one size house is healthy in one district and detrimental to health in another. 66 HARV. L. REV. at 1056-57.

[57] See Babcock, *supra* note 55, at 201.

[58] See Babcock, *supra* note 55, at 202.

floor area restrictions would tend to cause houses built at a later date to be on a par or closely approximate in value the original houses. But in an area already quite fully developed and with few vacant lots a minimum floor area requirement for future homes requiring, as a practical matter, buildings highly disproportionate in cost to surrounding buildings may well be struck down as unreasonable. The basic assumption in this area seems to be that the cluster of low cost houses that might be developed were it not for these restrictions would create a financial burden on the community not reimbursed in the form of taxes to a far greater extent than would large, less densely packed homes.[59] However, it is possible that the former type development would attract the lower income groups who because of their financial condition are more likely to remain in and patronize that area. If this is true, an interesting question arises as to whether this increased local business compensates for the smaller tax return from the property.

SUBDIVISION CONTROL

Another approach to the control of haphazard development is through subdivision control. Under this system of control, enabling acts provide that planning boards may adopt an official plan or map of the community.[60] The planning board may be authorized to approve or disapprove or modify plats of proposed subdivisions.[61] Plats submitted for approval should, where an official plan has been adopted, be co-ordinated with that plan "so as to compose a convenient system conforming to the official map and properly related to the proposals shown by the planning board on the master plan. . . ."[62] Where these statutes provide for master plans, municipal authorities should follow the statutory steps in adopting the plan if they wish to rely upon it in disapproving plats for improperly placed roads.[63] Also if the enabling statute provides that regulations are to be adopted for the purpose of regulating subdivisions, the planning body must not mix its legislative and administrative functions.[64]

Some enabling statutes provide that, prior to approval, the planning board may require such things as the following: streets sufficiently wide for prospective traffic and for access for fire-fighting equipment, graded, paved, and provided with curbs and gutters; and water mains, sanitary sewers, and storm drains or combined sewers installed in accordance with standards set up by the appropriate municipal department.[65] The statute may provide that this be done at the expense of the subdivider or that the community do it with the subdivider furnishing a performance bond.[66]

[59] There was some evidence to this effect in Simon v. Town of Needham, 311 Mass. 560, 565, 42 N.E.2d 516, 519 (1942).

[60] N.Y. TOWN LAW §272-a. See §§270, 273.

[61] N.Y. TOWN LAW §276.

[62] N.Y. TOWN LAW §277.

[63] *E.g.*, Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 137 Conn. 84, 75 A.2d 379 (1950). Where there is no official map the statute may provide that the proposed roads be properly related to the existing street system. See N.J. STAT. ANN. § 40:55-1.20 (Supp. 1954).

[64] See Beach v. Planning and Zoning Commission of Town of Milford, *supra* note 1.

[65] *E.g.*, N.Y. TOWN LAW §277. The planning board may waive these requirements if in the interest of public health, safety, and general welfare.

[66] *Ibid.*

Where a court finds that a master plan has been adopted, conditions placed on plat approval such as dedication of land for streets of greater width than existing public streets have been upheld as well as conditions requiring dedication of land for trees and shrubbery.[67] Some enabling acts provide that a subdivider may place a notation on his plat when submitted for recording that the streets are not to be considered public. The streets in such a case remain private until formally offered to and accepted by the public or until they are taken by eminent domain.[68] However, pressure for an offer to the public is imposed by a provision that no public municipal street utility be constructed on any street until it is public and placed on the official map, unless it is a subsurface utility operated for revenue.[69]

Subdivision controls seem aimed at preventing a property owner from realizing a profit at the expense of the community to the extent that he must provide for the initial cost of laying streets and public services such as water and sewerage. However, little of this aids in controlling population density or the number of residences that may be a continuing burden on the community in terms of maintaining the services. It is here that the relationship between subdivision control and such zoning restrictions as minimum lot size requirements comes into play. Statutes authorizing subdivision control may provide that the plat conform to the zoning regulations in force[70] or that minimum lot sizes be specified in the subdivision ordinance.[71] Land use restrictions would be of aid to the community in this situation only in so far as the activity sought to be controlled takes place within its jurisdiction. Thus where an enabling statute allows the community to zone or control subdivision only to its border there is nothing the community can do to prevent a property owner outside that area from subdividing land with complete disregard for the future consequences of his action. There may be some relief against this danger in a jurisdiction giving the community power to annex surrounding property on a showing of necessity.[72] In such a case the community would not necessarily be bound by a negative vote of the electorate in the district to be annexed and thus would seem to possess a greater freedom of action. The problem may also be alleviated to some extent by such statutes as that in Illinois giving the community jurisdiction to prepare plans and control subdivision in the contiguous territory one and one-half miles beyond the corporate limits.[73] However, where enabling acts give cities, counties, towns, and villages power to adopt zoning regulations and subdivision control, the town may be limited to its area outside that of an incorporated village or city.[74] There may be a problem here of a conflict between

[67] Ayres v. City Council of City of Los Angeles, 34 Cal.2d 31, 207 P.2d 1 (1949). If there is no master plan or official plan the New Jersey statute provides that no greater width than 50 feet be required. N.J. STAT. ANN. § 40:55-1.20 (Supp. 1954).

[68] See N.Y. TOWN LAW §278.

[69] N.Y. TOWN LAW §280.

[70] *E.g.*, N.Y. TOWN LAW §277.

[71] N.J. STAT. ANN. §40:55-1.15 (Supp. 1954).

[72] See Norfolk County v. City of Portsmouth, 186 Va. 1032, 45 S.E.2d 136 (1947).

[73] ILL. ANN. STAT. c. 24, §53.2 (1942).

[74] See N.Y. TOWN LAW §§261, 276.

the standards of, say, a town and a city. Where the town's standards are lower than those of the city, subdivision taking place under the town's standards may work to the detriment of the city upon subsequent annexation.

In as much as zoning and subdivision control are both accomplished by the exercise of police power, it would seem that the considerations applicable to the former would also apply to the latter. However, some jurisdictions regard recordation of the subdivision plat a privilege and allow a community to impose reasonable conditions before the privilege is granted.[75] Under such reasoning the community may be able to exercise more control than would be possible under the traditional doctrine of police power.

CONCLUSION

There is a great area of uncertainty as to the extent communities may consider financial burdens in formulating zoning or subdivision policy. Most cases indicate that it may be considered as part of the over-all picture. Indeed, its consideration does not invalidate the action when there exists adequate justification on other grounds. Active use of land use restrictions to increase revenue would seem to be invalid absent a provision in the enabling act, except in practical effect where minimum floor area regulation has been upheld.[76] It has been suggested that the proper justifications for minimum standards in zoning are not the traditional subjects of police power, but rather preservation of property value and hence conservation of tax base.[77] Attempts to attain this objective may be enhanced by provisions in the enabling statute, such as that of Illinois, that preservation of "taxable value" is a purpose of zoning. Once public economy is acknowledged as a justification for the exercise of police power, the means of control would seem to be through preservation of property value. In such a case it is difficult to see how an attack that existing investments are being protected can succeed. When an individual or a particular group of people is protected at the expense of the remainder of the community the attack might be sustained, for the police power is being used to discriminate among

[75] See Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928); Carter, J. dissenting in Ayres v. City Council of City of Los Angeles, 34 Cal.2d 31, 43, 207 P.2d 1, 8 (1949).

[76] The Georgia enabling act provides that the regulations "be made in accordance with a comprehensive plan designed for the purposes, among others, of . . . encouraging such distribution . . . of land development and utilization as will tend to facilitate economic and adequate provisions for transportation, communications, roads, airports, water supply, drainage, sanitation, education, recreation or other public requirements. . . . Such regulations shall be made with reasonable consideration, among others, to . . . securing economy in governmental expenditures. . . ." GA. CODE ANN. §69-802 (Supp. 1951).

[77] Babcock, *supra* note 55, at 201. See Landels, *Zoning: An Analysis of Its Purposes and Its Legal Sanctions*, 17 A.B.A.J. 163 (1931). At page 165 Mr. Landels states that "On analysis the primary objects of zoning are found to be . . . the protection of the value . . . of urban land, and the assurance of such orderliness in municipal growth as will facilitate the execution of the city plan and the economical provision of public services."

In the course of interviews with city planning officials the writer was made aware of the fact that although exclusion of multi-family dwellings from single family zones is justified as a means of securing protection of health and fire safety, the planning officials are primarily concerned with the reduced municipal expenditures and increased tax return involved when the community decreases the number of multi-family dwellings in favor of more single family residences.

members of the community. The exercise of police power should be held to the constitutional test of reasonableness when used to protect municipal finances as it is when used for the traditional subjects of police power. However, absent that factor, preservation of taxable value would seem different from the other concepts for here what is good for the community will on the whole be good for the property owner. Once given the power to regulate in this manner the community almost has to protect the property owner.

Preservation of taxable value as a justification will produce results raising at least two related problems. One is that pronounced economic segregation will be a practical effect. It would seem that sliding scale minimum floor area zoning would be valid if it need no longer be justified on grounds of health. In such a case the income groups will be forced to seek the district which allows the size house they are financially able to afford. A single minimum floor area requirement for the community may force low income groups to migrate to other areas where they may be faced with the same situation or the second area may be forced to adopt similar measures to prevent a sudden influx of people. This raises the question of the unit which is to be used in zoning.[78] Focusing solely on local conditions may produce detrimental effects in the surrounding areas that will have repercussions at some future time. The problem may also arise from situations in which communities zoned purely residential rely on neighboring communities for such things as stores and schools.[79] While the neighboring communities will benefit from the increased business, they will also be educating children for whom there will be no reimbursement in the form of taxes. Even if the schools receive tuition for these children there remains inconvenience in the arrangement. Perhaps some sort of regional unit should be adopted with less stress by the courts on the local aspect.

[78] See Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1053 (1953).

[79] See Gignoux v. Village of Kings Point, 199 Misc. 485, 99 N.Y.S.2d 280 (Sup. Ct. 1950).

NEW DEVELOPMENTS IN BRITISH LAND PLANNING LAW—1954 AND AFTER

DESMOND HEAP*

I

HISTORICAL OUTLINE OF LEGISLATION—1909 TO 1947

The controlled development of land by authorities who were not necessarily the owners of the land they controlled started in England in the nineteenth century, which saw the beginnings of Public Health Law and of Housing Law. Both these codes of law were—and still are—of important but limited scope, and it remained for the twentieth century to bring forth enactments controlling in broader and more comprehensive fashion the way in which land could be used. These enactments, starting in 1909, constitute the Law of Land Planning which is now nearing its half century of existence.

A. The 1909 Act

Part II, entitled "Town Planning," of the Housing, Town Planning, etc., Act, 1909,[1] is the first enactment in Great Britain to deal with the control of land use. Under that Act (Sec. 54) local authorities were empowered (though none were obliged) to make

> a town planning scheme . . . as respects any land which is in course of development or appears likely to be used for building purposes, with the general object of securing proper sanitary conditions, amenity, and convenience in connexion with laying out and use of the land, and of any neighboring lands.

In this statutory provision is to be found the germ of that ever-growing legislative code which now requires that development of any particular piece of land shall be viewed from all aspects and be permitted only if it is not merely good in itself but is also good in relation to other land which nowadays no longer needs to be neighboring land.

On the old common law maxim, *sic utere tuo ut alienum non laedas* (the basis of the doctrine of good neighborliness), statutory planning, evolving as it has come down the years, has now built a great edifice controlling individual schemes of development for the benefit of the country as a whole. Indeed, so great is this edifice and so far-reaching its control, that there is a need, increasingly imperative, in a tightly populated island like Great Britain, to husband and put only to its best use the country's inadequate supply of land, which alone can justify either the edifice or the interference with the liberty of the individual inseparably associated with it.

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[1] 9 EDW. 7, c. 44.

In 1909 planned control of land use, within the limited ambit of the Act of 1909, was secured through the medium of a town planning scheme. A local authority had to receive the prior approval of the local Government Board before making a scheme and the scheme itself, when made, was subject to the approval of the Board.

By the Housing Town Planning, etc., Act, 1919,[2] the necessity of first obtaining consent of the Local Government Board to the making of a scheme was in most cases removed and, much more important still, the 1919 Act made it obligatory for certain local authorities with a population of 20,000 or more to make town planning schemes within a specified period.

Voluntary statutory planning was thus largely replaced by compulsory statutory planning, and the first hint of regional planning appeared in the provision of the 1919 Act, whereby two or more authorities might agree to act in concert through a joint committee for the making of a town planning scheme which would be broader and more comprehensive than any made by an individual authority acting alone.

B. The 1925 Act

In 1925, by the Town Planning Act of that year,[3] land planning first received an Act of Parliament exclusively to itself, the 1925 Act, repealing all earlier planning legislation, becoming the principal Act on the subject.

Notwithstanding increasingly lengthy enactments, it was, in 1932, still true to say that town planning law, generally speaking, was unable to touch the inner core of badly developed central areas (which were too late, so to speak, for planning control) nor, on the other hand, to catch the broad rolling acres of the countryside which were not yet regarded as ripe for planning control. Between these two extremes there was, of course, the fringe development of towns, and it was really only in areas of this kind, that is to say, in *suburban* areas, that planning control could effectively make its presence felt.

C. The 1932 Act—Town and Country Planning

This state of affairs was altered by the Town and Country Planning Act, 1932,[4] which projected planning control inwards towards congested central areas and outwards towards the rolling countryside, the very title of the new Act (The Town *and Country* Planning Act) indicating the widened scope of control. But if the 1932 Act, repealing all previous planning legislation, drastically widened the area over which planning control could be exercised, the exercise of that control became once again a purely voluntary matter for the discretion of those local authorities entitled to make planning schemes, because the 1932 Act repealed the statutory obligation, imposed on certain authorities in 1919, of preparing planning schemes within a limited period.

Under the 1932 Act the outstanding features of planning control could be summarized under four heads as follows:

[2] 9 & 10 GEO. 5, c. 35.
[3] 15 GEO. 5, c. 16.
[4] 22 & 23 GEO. 5, c. 48.

(1) Planning schemes were essentially local in character as is evidenced by the fact that they could be made by no less than 1441 planning authorities in England and Wales and by the further fact that the Minister of Health, exercising central supervision over the approval of such schemes, was not bound to look upon them with a breadth of vision any wider in its outlook than that of the scheme which was before him for approval.

(2) The exercise of planning control by the 1441 authorities previously mentioned was entirely optional and many of these authorities, by refraining from taking the necessary steps to make a planning scheme, failed to exercise any adequate control.

(3) Compensation was payable, subject to a variety of exceptions, by local authorities for injurious effects caused by restrictions contained in a planning scheme.

(4) Seventy-five per cent of the increase in value of land (*i.e.*, betterment) caused by the provisions of an operative planning scheme was (at least in theory) recoverable by the local authority responsible for carrying out the scheme.

Each of these four outstanding features was to receive legislative attention in the great impetus given by the devastations of the enemy during the war of 1939-1945.

D. The Two Acts of 1943

The year 1943 saw the passing of two short but highly important Acts. First, the Town and Country Planning (Interim Development) Act[5] of that year made the preparation of planning schemes obligatory, and effective planning control over all development anywhere in the country became immediately available under that Act. Second, the local character, so far inherent in all planning schemes, came to an end with the passing of the Minister of Town and Country Planning Act, 1943.[6] This Act established, for the first time, a Minister concerned exclusively with planning control, the new Minister being charged with the duty of "securing consistency and continuity in the framing and execution of a national policy with respect to the use and development of land throughout England and Wales."

It is really impossible to exaggerate the importance of these particular words. They show clearly two things: first, that the Minister is to have the last word on (at least) all matters of importance relating to the controlled development of all the land in the country; and, second, that the control is to be exercised in accordance with a national policy. Thus it is that planning decisions taken on a local or town basis from 1909, on a county or perhaps even a regional basis after 1929, now come to be taken on an even broader and more national basis after 1943.

E. The 1944 Act

The Town and Country Planning Act, 1944,[7] was in the nature of an ad hoc

[5] 6 & 7 GEO. 6, c. 29. [6] 6 & 7 GEO. 6, c. 5. [7] 7 & 8 GEO. 6, c. 47.

provision giving local authorities wider powers of compulsory purchase at 1939 values over land which was required for redevelopment as a whole in order to deal with the problems of "blitz" (areas of damage caused by enemy action) and "blight" (areas of bad layout or obsolete development), and the consequential relocation of population or industry from congested built-up areas.

In 1947 the legislative slate was again wiped clean by the Town and Country Planning Act of that year.[8] This monumental enactment drew for much of its content on the Barlow Report[9] of 1940, the Scott Report[10] of 1942, the Uthwatt Report[11] of 1942, and the Coalition Government's White Paper on the Control of Land Use[12] of 1944, though it never followed in their entirety the provisions of any one of these documents.

F. The Town and Country Planning Act, 1947—A New Beginning

The 1947 Act,[13] preserving the idea of planning on a national basis, strengthened the power of the Ministry towards that end; nationalized development values in all land, allowing claims by landowners for their loss of development value to be made on a total sum fixed at £300,000,000 (Part IV of the Act); and enacted that no development of land could take place without (a) planning permission (Part III of the Act), and (b) payment of a development charge representing the increase in value of the land arising from the development (Part VII of the Act). It followed from these provisions that if planning permission were refused, then except in a few cases no compensation was payable because no loss could be said to have been sustained by the landowner who no longer had vested in him the development rights in his land.

The planning provisions of the 1947 Act have, on the whole, worked well and no serious suggestion has been made for any substantial modification of them. On the other hand, the financial provisions (Part VI and Part VII) of the Act (whereby it sought to solve planning's vexed question of compensation and betterment) consisting of complementary provisions relating to (a) claims on the £300,000,000 Fund and (b) development charges, were severely criticized from many different quarters and on a variety of grounds including the following: Development charges destroyed a man's incentive to develop his land; the once-and-for-all distribution of the £300,000,000 Fund would have an inflationary effect on the country's economy; and the provisions were so complex that they were simply not understood by the man in the street and accordingly lacked the support of popular opinion without which no statutory provision could expect to succeed.

[8] 10 & 11 GEO. 6, c. 51. See CHARLES M. HAAR, LAND PLANNING LAW IN A FREE SOCIETY (1951).

[9] REPORT OF THE ROYAL COMMISSION ON THE DISTRIBUTION OF INDUSTRIAL POPULATION, CMD. No. 6153 (1939).

[10] REPORT OF THE COMMITTEE ON LAND UTILISATION IN RURAL AREAS, CMD. No. 6378 (1942).

[11] FINAL REPORT OF THE EXPERT COMMITTEE ON COMPENSATION AND BETTERMENT, CMD. No. 6386 (1942).

[12] THE CONTROL OF LAND USE, CMD. No. 6537 (1944).

[13] See note 8, *supra*.

II

THE WHITE PAPER OF 1952—NEW FINANCIAL PROPOSALS

Accordingly, much new thinking was given to the financial aspects of land planning. It was becoming increasingly clear that land planning and £.s.d. were interrelated matters and would have to go forward hand in hand or not at all. The importance of the financial side of the matter was emphasized in the Report of the Committee on Qualifications of Planners[14] (the Schuster Committee) which observed (para. 64):

> We have shown how far-reaching the conception of town and country planning has become and how wide are the powers available to planning authorities; but what they can actually achieve will be subject to severe practical limitations. The existence of these limitations does not, however, mean that our conception of the scope of planning is invalid. What it does mean is that it will not work in practice unless the planning authorities take account of them. In fact the limitations serve to increase the responsibility of the authorities in relation to the determination of policies.

The Report also states (para. 65(5)):

> Cost in fact must dominate positive planning, since there is no end to the improvements in environment which are ideally desirable. It is cost that sets the limit and when cost is ignored—as indeed appears to have been the case in some of the contemporary planning proposals—then planning is just so much waste paper.

Having once recognized that the financial aspects of land planning *do* exist and *must* be reckoned with, the next question was to consider the lines upon which they were to be treated. These were set out in the Government White Paper of November 18, 1953,[15] showing its Proposals for Amending the Financial Provisions of the 1947 Act.

The White Paper Proposals provoked a good deal of argument on all sides but if one excluded those proposals which related to the "unscrambling" of past things which took place between the commencement of the 1947 Act and the publication of the White Paper, the new Financial Proposals so far as they related to *future* transactions were reasonably simple. In effect they provided for not more than three things as follows:

(1) for the abolition of development charges in all development commenced on or after November 18, 1952;

(2) for stopping the once-and-for-all distribution of the 1947 Act's £300,000,000 Fund; and

(3) for the payment of *limited* compensation *if and when* a person was prevented from reaping the development value of his land either by

(a) being refused planning permission for the development of the land or having planning permission for its development granted subject

[14] CMD. No. 8059 at 18, 19 (1950).
[15] CMD. No. 8699 (1953).

to restrictive conditions which go beyond the bounds of what is currently referred to as "good neighborliness"; or

(b) by having his land compulsorily acquired by a public authority at the current existing use value of the land.

In either of the foregoing cases (a) or (b) the compensation payable was limited and would not exceed the amount of the claim (*if* one had been made) on the 1947 Act's £300,000,000 Fund in respect of the land which was affected.

In other words, the three things which the White Paper Proposals sought to do were:

(1) to return the development value in land to the landowners;
(2) to abandon further attempts at direct or ad hoc collection of betterment; and
(3) to accept the principle of paying in certain cases limited compensation for (a) planning restrictions or (b) compulsory purchase of land at its current existing use value.

III

THE TOWN AND COUNTRY PLANNING ACT, 1953

The proposals of the White Paper of 1952 have been translated into statutory effect by two legislative instalments. The first of these was the short Town and Country Planning Act, 1953,[16] which abolished development charges on all development on or after November 18, 1952 (the date of publication of the Government's new proposals in the White Paper of that date) and stopped the distribution (due, under the 1947 Act, to take place in July 1953) of the £300,000,000 Fund established under the 1947 Act to those who had successfully claimed on that Fund for loss of the development value in their land by virtue of the provisions of the 1947 Act.

IV

THE TOWN AND COUNTRY PLANNING ACT, 1954

The second legislative instalment for translating into statutory effect the proposals of the White Paper of 1952, is the recently enacted Town and Country Planning Act, 1954,[16a] which received the Royal Assent on November 25, 1954, and came into operation for all purposes on January 1, 1955. It is a substantial and highly complex measure divided into six Parts and comprising in all seventy-two sections and eight schedules.

The relationship between the 1953 Act and the 1954 Act will be appreciated. The Uthwatt Committee had reported that proper control of land use would not work until something was done about the compensation problem inseparably associated with such control. The problem had been faced in the 1947 Act in Part VI and

[16] 1 & 2 ELIZ. 2, c. 16.
[16a] 2 & 3 ELIZ. 2, c. 72.

Part VII, each of which was complementary to the other. Part VI (dealing with claims on the £300,000,000 Fund) dealt with the compensation side of the problem and Part VII (dealing with development charges) dealt with the betterment side of the problem.

The 1947 Act had a strictly logical, theoretically perfect, and entirely dispassionate approach to the compensation-betterment problem, and it was found (though the point is not free from argument) that this approach, by and large, did not work, principally (it may well be submitted) because it took insufficient note of human nature which is not inherently addicted to doing anything for nothing, but, on the contrary, is prone to ask, "What do I get out of this?"

In consequence, a new approach to the problem was made. This was outlined (as already explained) in the White Paper of 1952 and made into law, first, by the Town and Country Planing Act, 1953 (which by abolishing development charges and thereby replacing Part VII of the 1947 Act, resolved the betterment side of the compensation-betterment problem by the simple expedient of giving it up), and, second, by the new Town and Country Planning Act, 1954 (which replaces Part VI of the 1947 Act and deals with the compensation side of the problem). Thus, just as Parts VI and VII of the 1947 Act were complementary, the one with the other, so equally are the two Planning Acts of 1953 and 1954.

The Act of 1947 is still the principal Act in land planning but its financial provisions are fundamentally altered by the 1953 Act and the 1954 Act. All these Acts may now be cited comprehensively as the "Town and Country Planning Acts, 1947 to 1954," and with the host of subordinate legislation in the form of regulations and orders made under them, these Acts form the planning code under which the use of land in England and Wales is now controlled (similar control is available in Scotland under the Town and Country Planning (Scotland) Acts, 1947 to 1954).

V

BASIS OF THE NEW SYSTEM OF COMPENSATION UNDER THE 1954 ACT

The 1954 Act provides a new system of compensation for (1) all planning restrictions on the development of land, and (2) the compulsory purchase of land by local and other public authorities. This new system of compensation is based on claims duly made on the £300,000,000 Fund established under Part VI of the 1947 Act, and formally assessed and admitted by the Central Land Board as entitled to satisfaction out of that Fund. In other words, the new system of compensation is based on all those admitted (*i.e.*, established) claims on the 1947 Act's £300,000,000 Fund which ought to have been paid out (under the provisions of the 1947 Act) in July, 1953, but which (under the provisions of the 1953 Act) never were.

The existence of an established claim on the 1947 Act's £300,000,000 Fund is, generally speaking, a condition precedent to participation in any of the benefits conferred by the 1954 Act. Thus, any person who was entitled to claim on the £300,000,000 Fund, but who, for one reason or another, failed to do so, will find

little in the Act (except in section 35 and Part IV of the Act) for him, and the Act reopens no doors in order to allow any of those who failed to claim on the £300,000,000 Fund now to do so. Provision is made, however, for an additional payment to be made in certain cases of compulsory purchase where a person failed or forgot to claim on the £300,000,000 Fund (§35). This additional payment is on an *ex gratia* basis and cannot be claimed as of right. It is later referred to more fully.

It is also to be noted that anyone who did remember to claim on the 1947 Act's £300,000,000 Fund and got his claim formally and finally assessed by the Central Land Board, only to find it excluded from any share in the Fund by reason of its being a "small claim" within the provisions of section 63 of the 1947 Act, will find that he is still excluded from any of the benefits of the 1954 Act.

VI

PAYMENTS FOR PAST DEPRECIATION OF LAND VALUES—PART I OF THE 1954 ACT

A. Payments in Reference to Established Claims

Part I of the Act provides for the making of "payments" for depreciation of land values caused by the coming into operation of the 1947 Act, such payments to be made by the Central Land Board by reference to established claims (claim holdings) on the 1947 Act's £300,000,000 Fund (1954 Act, §1).

Part I of the 1954 Act goes on to deal with those cases in which payments by the Central Land Board will be made in respect of past matters and events (other than past planning decisions which are dealt with in Part V of the Act), occurring between the commencement of the 1947 Act on July 1, 1948, and the commencement of the 1954 Act on January 1, 1955. These cases are as set forth below.

1. *Case A—Payment Where Development Charge Incurred.* Under this Case the holder of a claim holding is entitled to a payment by the Central Land Board if he has incurred a development charge in developing the land to which the claim holding relates or if his predecessor in title incurred such a charge (§3).

The amount of the payment will, generally speaking, correspond to the amount of the development charge (§3(4)), although it will not exceed the value of the claim holding (§3(3)).

Interest at 3½ per cent will be payable as from July 1, 1948, to the date when the payment under Case *A* is made by the Board or to June 30, 1955, whichever is the earlier (§14).

2. *Case B—Payment Where Land Compulsorily Acquired or Sold at a Price Wholly or Partly Excluding Development Value.* Under this Case the holder of a claim holding is entitled to a payment by the Central Land Board when the land covered by the claim holding has been either compulsorily acquired or sold between certain dates at a price (as, for example, an existing use price) which did not reflect the full 1947 development value of the land as shown by the amount of the established claim on the 1947 Act's £300,000,000 Fund (§5(1)).

No payment will, however, be made (§5(2)) under Case *B* where on a compulsory purchase or on a sale to a public authority possessing compulsory purchase powers, the purchase price of the land was calculated either (a) by reference to March, 1939, prices in accordance with the Town and Country Planning Act, 1944, or (b) on the basis of equivalent reinstatement. Moreover, compensation for disturbance, severance or injurious affection is not to be regarded as part of the purchase price (§6(1)(a)).

No payment will be made under Case *B* unless (§5(3)) the land to which it relates was either:

(a) acquired by a public authority possessing compulsory purchase powers (§69(1)) under a notice to treat served, or a contract made, on or after August 6, 1947, and before the commencement of the Act; or

(b) sold, otherwise than by a public authority with compulsory powers, pursuant to

(i) a contract made on or after August 6, 1947, and before November 18, 1952, or

(ii) an option granted on or after July 1, 1948, and before November 18, 1952.

The amount of the payment under Case *B* will be the value of the claim holding reduced by the amount of any excess which may have been paid over the existing use value of the land (§5(4)).

During the early years of the 1947 Act the Central Land Board and the Ministry of Town and Country Planning (now renamed "the Ministry of Housing and Local Government") sought to encourage sales of land at existing use value, that is to say, at prices which excluded all development value, the vendor retaining the claim on the 1947 Act's £300,000,000 Fund. Any vendor who followed this policy and who now holds the claim on the £300,000,000 Fund, will qualify for a payment under Case *B* of the 1954 Act.

Interest on the amount of payment under Case *B* will be paid as under Case *A* above (§14).

3. *Case C—Payment Where Land Given Away.* Under this Case the holder of a claim holding is entitled to a payment by the Central Land Board if he has disposed absolutely of the whole of his beneficial interest in the land affected by the claim holding otherwise than for valuable consideration (§7(1)) which latter does not include marriage or a purely nominal consideration (§69(1)).

The amount of the payment will be the full value of the claim holding (§7(3)), but no payment will be made unless the gift was made on or after July 1, 1948, and before November 18, 1952 (§7(2)).

Interest on the amount of the payments will be paid as under Case *A* above (§14).

little in the Act (except in section 35 and Part IV of the Act) for him, and the Act reopens no doors in order to allow any of those who failed to claim on the £300,000,000 Fund now to do so. Provision is made, however, for an additional payment to be made in certain cases of compulsory purchase where a person failed or forgot to claim on the £300,000,000 Fund (§35). This additional payment is on an *ex gratia* basis and cannot be claimed as of right. It is later referred to more fully.

It is also to be noted that anyone who did remember to claim on the 1947 Act's £300,000,000 Fund and got his claim formally and finally assessed by the Central Land Board, only to find it excluded from any share in the Fund by reason of its being a "small claim" within the provisions of section 63 of the 1947 Act, will find that he is still excluded from any of the benefits of the 1954 Act.

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Part I of the 1954 Act goes on to deal with those cases in which payments by the Central Land Board will be made in respect of past matters and events (other than past planning decisions which are dealt with in Part V of the Act), occurring between the commencement of the 1947 Act on July 1, 1948, and the commencement of the 1954 Act on January 1, 1955. These cases are as set forth below.

1. *Case A—Payment Where Development Charge Incurred.* Under this Case the holder of a claim holding is entitled to a payment by the Central Land Board if he has incurred a development charge in developing the land to which the claim holding relates or if his predecessor in title incurred such a charge (§3).

The amount of the payment will, generally speaking, correspond to the amount of the development charge (§3(4)), although it will not exceed the value of the claim holding (§3(3)).

Interest at 3½ per cent will be payable as from July 1, 1948, to the date when the payment under Case A is made by the Board or to June 30, 1955, whichever is the earlier (§14).

2. *Case B—Payment Where Land Compulsorily Acquired or Sold at a Price Wholly or Partly Excluding Development Value.* Under this Case the holder of a claim holding is entitled to a payment by the Central Land Board when the land covered by the claim holding has been either compulsorily acquired or sold between certain dates at a price (as, for example, an existing use price) which did not reflect the full 1947 development value of the land as shown by the amount of the established claim on the 1947 Act's £300,000,000 Fund (§5(1)).

No payment will, however, be made (§5(2)) under Case *B* where on a compulsory purchase or on a sale to a public authority possessing compulsory purchase powers, the purchase price of the land was calculated either (a) by reference to March, 1939, prices in accordance with the Town and Country Planning Act, 1944, or (b) on the basis of equivalent reinstatement. Moreover, compensation for disturbance, severance or injurious affection is not to be regarded as part of the purchase price (§6(1)(a)).

No payment will be made under Case *B* unless (§5(3)) the land to which it relates was either:

(a) acquired by a public authority possessing compulsory purchase powers (§69(1)) under a notice to treat served, or a contract made, on or after August 6, 1947, and before the commencement of the Act; or

(b) sold, otherwise than by a public authority with compulsory powers, pursuant to

(i) a contract made on or after August 6, 1947, and before November 18, 1952, or

(ii) an option granted on or after July 1, 1948, and before November 18, 1952.

The amount of the payment under Case *B* will be the value of the claim holding reduced by the amount of any excess which may have been paid over the existing use value of the land (§5(4)).

During the early years of the 1947 Act the Central Land Board and the Ministry of Town and Country Planning (now renamed "the Ministry of Housing and Local Government") sought to encourage sales of land at existing use value, that is to say, at prices which excluded all development value, the vendor retaining the claim on the 1947 Act's £300,000,000 Fund. Any vendor who followed this policy and who now holds the claim on the £300,000,000 Fund, will qualify for a payment under Case *B* of the 1954 Act.

Interest on the amount of payment under Case *B* will be paid as under Case *A* above (§14).

3. *Case C—Payment Where Land Given Away.* Under this Case the holder of a claim holding is entitled to a payment by the Central Land Board if he has disposed absolutely of the whole of his beneficial interest in the land affected by the claim holding otherwise than for valuable consideration (§7(1)) which latter does not include marriage or a purely nominal consideration (§69(1)).

The amount of the payment will be the full value of the claim holding (§7(3)), but no payment will be made unless the gift was made on or after July 1, 1948, and before November 18, 1952 (§7(2)).

Interest on the amount of the payments will be paid as under Case *A* above (§14).

4. *Case D—Payment Where Claim Holding Purchased.* Under this Case the holder of a claim holding is entitled to a payment by the Central Land Board if he purchased the claim holding for valuable consideration (§69(1)) or derives title to it from someone who so purchased it, the claim holding and the land to which it relates never having been held by the same person since the purchase was effected (§8(1)).

The amount of the payment will be the value of the claim holding or the amount paid for the claim holding, whichever is the less (§8(3)), but no payment will be made unless the purchase of the claim holding took place, or was in pursuance of a contract made, before November 18, 1952 (§8(2)).

Interest on the amount of the payment will be paid as under Case *A* above (§14).

5. *Payments to Successors in Title of Original Claim Holder.* A successor in title to a claim holding is entitled in certain circumstances to receive any payment which his predecessor, had he continued to be the claim holder, would have been able to receive under Case *A,* and Case *B,* or Case *C* (but not Case *D*) (§9). This provision will protect, *inter alios,* a mortgagee of a claim holding (§9(b)(ii)).

6. *Payments in Cases Analogous to Case B.* Payments may be made by the Central Land Board (or the Lands Tribunal on appeal) to the holder of a claim holding in certain cases analogous to Case *B* (§10).

7. *Residual Payments in Cases Analogous to Case A and Case B.* On application payments (reflecting the residue of the value of a claim holding) may be made by the Central Land Board to an applicant who is *not* the holder of a claim holding but who has bought or leased the land affected by the claim holding on terms which included some part of the development value of the land (*i.e.,* more than existing use value was paid) from an owner who retained the claim holding, the applicant having subsequently paid development charge or had his land bought by a public authority at existing use value (§11).

8. *Procedure for Claiming a Payment Under Part I of the 1954 Act.* Section 13 of the Act and the Central Land Board Payments Regulations, 1954, made thereunder prescribe the manner of, and the period for, making application to the Central Land Board for a payment under Part I of the 1954 Act. Applications must be made to the Board on or before April 30, 1955.

Where the decision of the Central Land Board on an application for a payment under Part I of the 1954 Act is disputed there is a right to appeal (within thirty days of the Board's decision) to the Lands Tribunal (§13).

The aggregate principal amount which can be paid on all applications relating to the same claim holding cannot exceed the value of the claim holding (§12).

9. *Effect of Payments under Part I on Claim Holdings.* Payments made under Part 1 of the 1954 Act go in reduction or in extinguishment (as the case may be) of the claim holding in connection with which they are made (§15).

VII

Compensation for Past Planning Decisions and Past Revocations or Modifications of Planning Permissions—Part V of the 1954 Act

A. The Right to Compensation

Part V of the Act deals with compensation to be paid by the Minister of Housing and Local Government for past planning decisions, already given between the commencement of the 1947 Act and the commencement of the 1954 Act, whereby land has been depreciated in value by reason of planning permission for its development having been refused or granted subject to onerous conditions (§§42, 43, and 26). Similarly the past revocation or modification of an earlier planning decision may have depreciated the value of land before the commencement of the 1954 Act, and here again compensation is payable by the Minister (*ibid.*).

The amount of compensation will depend on how much depreciation the land has sustained but it will never exceed the value of the claim holding affecting the land (§44).

Compensation under Part V will carry interest at 3½ per cent as from July 1, 1948, to the date of payment or until June 30, 1955, whichever is the earlier (§46(1)).

Claims for compensation under Part V of the Act must, in accordance with the Town & Country Planning (Compensation) Regulations, 1954, be made within six months of the commencement of the Act, but the Minister may extend this time in a particular case (§§45(1) and 22(2)).

B. Exclusion of Compensation

The right to compensation under Part V of the 1954 Act is subject (§43(4)) to most of the limitations which apply under Part II of the Act relating to compensation in respect of future planning decisions (which are more fully explained later).

The Minister has the right to review any case in which compensation may be payable under Part V of the 1954 Act (§45(3)).

C. Effect of Payment of Compensation under Part V on Claim Holdings

Compensation paid under Part V of the 1954 Act will go in reduction or extinguishment (as the case may be) of the claim holding in connection with which it is paid (§46(2)).

D. Apportionment, Registration, and Repayment of Compensation under Part V

Compensation under Part V of the 1954 Act in excess of £20 will be apportionable, registrable, and liable to repayment or subsequent development of the relevant land as in the case of compensation payable under Part II of the Act relating to compensation payable in respect of future planning decisions (§46(4) applying §§28 and 29 of the 1954 Act) except that (as under Part IV of the Act) compensation for modification of an existing planning permission will not be recoverable on the subsequent carrying out of development in accordance with the modified permission.

VIII

CONVERSION OF RESIDUE OF A CLAIM HOLDING INTO "UNEXPENDED BALANCE OF ESTABLISHED DEVELOPMENT VALUE"

Any claim holding, or any remnant of a claim holding, still remaining after claims under Part I and Part V of the 1954 Act (relating to *past* matters and events and to *past* planning decisions respectively) have taken effect becomes (together with an addition of one seventh of its value) attached to the relevant land and forms the "original unexpended balance of established development value" associated with the land (§17). This original balance sets the upper limit or maximum amount of compensation which can ever become payable under Part II and Part III of the 1954 Act relating respectively to future planning decisions and future compulsory purchases of land. The addition of the seventh represents approximately the interest (less tax) which would have been payable if the whole value of the claim holding had been paid out under Part I or Part V of the Act.

IX

COMPENSATION FOR FUTURE PLANNING RESTRICTIONS—PART II OF THE 1954 ACT

The 1947 Act, having expropriated for the state all development value in land, naturally made no provision for the payment of compensation on a refusal of planning permission for development or on a grant of permission subject to conditions (except when the development was within Part II of the Third Schedule to the 1947 Act, *i.e.*, was development falling within the ambit of existing use).

By the abolition of development charges by the 1953 Act development value was restored to land and accordingly the 1954 Act provides (subject to wide exceptions dealt with later) for the payment of compensation for planning decisions which prevent a person realizing the development value in his land.

A. Two Codes for Compensation in the Future

After January 1, 1955 when the 1954 Act commenced, there are thus two codes of compensation. Which of the two codes will apply in any given case will depend on whether the development which is restricted is "existing use development" (*i.e.*, development falling within the ambit of the existing use of land or buildings) or is "new development" (*i.e.*, development which goes out and beyond the ambit of existing use).

If the development falls within the ambit of existing use (that is, if the development is of the kind mentioned in Part II of the Third Schedule to the 1947 Act) then on a refusal of planning permission compensation will continue to be payable under section 20 of the 1947 Act. If the restricted development is something outside the ambit of existing use then the development is termed "new development" (§16(5)) and is dealt with under Part II of the 1954 Act.

B. Compensation for Planning Restrictions on "New Development"

For a planning restriction on "new development" compensation may be payable

under the 1954 Act (§19). It is a condition precedent to the getting of any compensation under the 1954 Act for planning restrictions that there shall be an unexpended balance of established development value (§§17, 18) for the time being attached to the land in question (§19(1)).

The amount of the compensation (if any) will depend on how far the affected land is depreciated by the planning restriction (§§25, 26, and 27), but will not exceed the amount of the unexpended balance of established development value for the time being attaching to the land (§25). Any compensation paid will go in reduction or extinguishment, as the case may be, of the unexpended balance attaching to the land (§18), and it may be added that as the object of the 1954 Act is to compensate only for development value which, owing to planning restrictions, becomes incapable of being realized, the value of any "new development" taking place on or after July 1, 1948, and not made the subject of a development charge, will also go in reduction or extinguishment of the unexpended balance (§18), the value of any such "new development" being calculated in accordance with the Fourth Schedule to the 1954 Act.

Claims for compensation under Part II of the Act must, in accordance with the Town & Country Planning (Compensation) Regulations, 1954, be made within six months of the relevant decision, but the Minister can extend this in a particular case (§22(2)).

C. Exclusion of Compensation

There are many limitations on the payment of compensation which are to be found in sections 20 and 21 of the 1954 Act.

1. *Section 20.* Under this section compensation is excluded in a variety of cases.

First, there is no compensation payable on a refusal of planning permission for any development which consists of or includes the making of any material change in the use of land or buildings (§20(1)). As most applications for planning permission in built-up areas are for change of use, it follows that compensation will not often be payable in connection with such applications.

Second, there is no compensation on refusal of planning permission for the display of advertisements or on the grant of such consent subject to conditions (§20(1)).

Third, compensation is excluded where the reason (or one of the reasons) for the refusal of planning permission is because the application for permission is premature, having regard to either one or both of the following matters, namely:

(a) the order of priority, if any, indicated in the development plan for the area in which the land is situated for development in that area;

(b) any existing deficiency in the provision of water supplies or sewerage services, and the period within which any such deficiency may reasonably be expected to be made good (§20(3)and (5)).

The first ground may not always be available because development is not always

staged (or programmed) in all parts of a development plan. Moreover, a planning application cannot in any case be "stood down" on the ground of prematureness for more than seven years from the date when it was first refused on this ground (*ibid.*).

Fourth, there is no compensation on a refusal of planning permission to develop land liable to flooding or subsidence (§20(4)).

Fifth, there is a wide exclusion under section 20(2) (6) and (7) of the 1954 Act of compensation in respect of planning permissions which are granted but which have conditions (some of them severe) attached to them. These conditions relate to:

(a) the number or disposition of the buildings on the plot of land affected by the planning application (thus, if application is made for houses at ten to the acre but only three are permitted no compensation will be payable);
(b) the dimensions, design, structure, and external appearance of a building and the materials of which it may be constructed (this gives a very wide power of control: under it stone may be required in place of brick, the number of floors in a building may be limited, the ratio of the size of the floor area to the size of the building plot may be reduced as the planning authority require; all these things may or may not make a building an uneconomic proposition in the eyes of the developer, but whether they do or not compensation is not payable on their being imposed as planning conditions);
(c) the layout of land including provision of facilities for the parking, loading, unloading or fueling of vehicles (under this basement car parks can be required in buildings without liability for compensation);
(d) the use of buildings or of land without buildings (this is a very broad exemption of liability for compensation, covering as it does the important matter of use zoning as shown in development plans);
(e) the location or design of a means of access to a highway or the materials of which it may be constructed;
(f) the mining or working of minerals.

There is a good deal in section 20, and particularly in section 20(2), of the 1954 Act which is based upon section 19 of the Town and Country Planning Act, 1932, which sought to exclude payment or compensation for injurious effects caused by the coming into force of a variety of provisions set out in a town planning scheme made under the 1932 Act. There were, however, many safeguards in section 19 of the 1932 Act which were calculated to temper the rigor of the section. By and large, section 20 of the 1954 Act contains the stings of section 19 of the 1932 Act with none of the safeguards.

2. *Section 21.* Under section 21 compensation is not to be paid on a refusal of planning permission "if, notwithstanding that refusal, there is available . . . planning permission to which this section applies," and section 21 applies to—

any development of a residential, commercial or industrial character, being developed which consists wholly or mainly of the construction of houses, flats, shop or office premises or industrial buildings (including warehouses), or any combination thereof.

The object behind this section was explained in the House of Commons by the Minister of Housing and Local Government, who said[17] that the section provides that:

> . . . compensation is not to be payable for refusal to allow one kind of development, let us say industrial, if another kind, let us say commercial or residential, is allowed. The principle is that, provided some reasonably remunerative development is allowed, the owner is not entitled to compensation because he is prevented from exploiting his land to the most remunerative development position.

D. Review of Planning Decision by Minister

Whenever the planning decision of a local planning authority gives rise to a claim for compensation the Minister may review the planning decision and, if he so desires, may vary it so as to avoid the payment of compensation (§23).

Section 23, in giving the Minister the final say on whether or not compensation is to be paid, is only reaffirming the power already given to him under the Minister of Town and Country Planning Act, 1943, of having the last word on planning (whether or not matters of compensation are involved) by reason of his being charged under that Act of 1943 with the "duty of securing consistency and continuity in the framing and execution of a national policy with respect to the use and development of land throughout England and Wales."

So much compensation is excluded by sections 20 and 21 of the Act that it may well be that the Minister will not frequently have to consider using his powers of review under section 23 for the purpose of avoiding liability for compensation.

E. Apportionment, Registration, and Repayment of Compensation

When an award of compensation exceeds £20 it will be apportioned among different parts of the relevant land in accordance with the manner in which such parts are affected by it (§28). The amounts charged to each part of the land will be registered in the register of local land charges (*ibid.*) and will thereafter become a charge on the land to which they relate.

It is most important for any purchaser of land on which compensation exceeding £20 has been paid to note that if, later, he wishes to carry out "new development" (§16(5)) on that land by—

(a) the construction of residential, commercial or industrial buildings (§29(2)(a)); or

(b) the mining or working of minerals (§29(2)(b)); or

(c) any other form of development which is in the Minister's opinion of such value to warrant the requirement (§29(2)(c));

[17] 525 H. C. DEB. 56 (5th ser. 1954).

then he must first *pay back* the compensation or so much as is attributable to the area of land which he seeks to develop (§29(1)). Any sum so repaid will be restored to the unexpended balance of established development value for the time being attaching to the land (§29(9)).

The Minister, however, has power to remit any such repayment in whole or in part in any case where proper development of the land is unlikely to be carried out if it is not remitted (§29(4)).

X

COMPENSATION ON FUTURE REVOCATION OR MODIFICATION OF PLANNING PERMISSION—PART IV OF THE 1954 ACT

A. The Right to Compensation

A planning permission once granted can in certain circumstances be later revoked or modified under section 21 of the 1947 Act, in which case compensation under that Act may be payable (1947 Act, §22) for abortive expenditure and loss or damage. No compensation was, of course, payable under the 1947 Act for depreciation in the value of land caused by revocation or modification, by reason of the fact that under the 1947 Act land contained no development value, such development value as it previously held having been expropriated by the 1947 Act to the state.

It was the 1953 Act which, by abolishing development charges, restored development value to land and, in consequence, the 1954 Act enlarges the right to claim compensation from the local planning authority on any revocation or modification (taking place after the commencement of the 1954 Act) of some earlier planning permission (whether granted before or after the commencement of the 1954 Act) so as to permit a claim for depreciation in value to be made (§38), and the scope of section 22 of the 1947 Act is widened accordingly. This enlarged compensation under Part IV of the 1954 Act may be claimed in respect of any land whether or not there is an unexpended balance of established development value attaching to it.

B. Apportionment, Registration, and Repayment of Compensation

Any compensation exceeding £20 will, where it is practicable so to do, be apportioned among the various parts of the land affected (§39), will be registerable as a local land charge (*ibid.*), and will be recoverable by the Minister on the subsequent carrying out (1954 Act, §41(1), applying §29) of "new development" of a kind to which section 29 of the 1954 Act applies (as to which see §29(2)). The Minister may, however, remit the recovery of the compensation in whole or in part (§41(1), applying §29).

Any compensation recovered by the Minister is payable by him to the local planning authority by whom the compensation was paid in the first place (§41(2) and (3)).

XI

COMPENSATION ON FUTURE COMPULSORY PURCHASE OF LAND—PART III OF THE 1954 ACT

A. Private Purchases at Market Value

The abolition of development charges by the Town and Country Planning Act, 1953, had the effect of returning to land-owners the development value of their land. Thus after the commencement of the 1953 Act on May 20, 1953, it became possible for a landowner to sell not only the existing use value of his land but its development value as well.

So far as the compulsory purchase of land was concerned the law as to the compensation to be paid by the acquiring authority remained as provided under Part V of the 1947 Act (*i.e.*, the compensation was existing use value only) until the coming into force of Part III of the 1954 Act on January 1, 1955.

B. Compulsory Purchase at Existing Use Value Plus 1947 Development Value

Part III of the 1954 Act amends this by providing that after the commencement of the 1954 Act (§30) there shall be paid on any compulsory purchase of land not only its existing use value current at the date of the notice to treat (in accordance with the 1947 Act) but also the 1947 development value of the land as evidenced by the unexpended balance of established development value (if any) attaching to the land at the date of the notice to treat (§31 and the Fifth Schedule).

Additional compensation on compulsory purchase is also payable under the 1954 Act where since July 1, 1948, expenditure has been incurred on certain works which have planning permission (§32).

When the compulsory purchase relates to certain special classes of land on which there does not exist, and could not exist, any established claim on the 1947 Act's £300,000,000 Fund for the simple reason that such land was precluded by the 1947 Act itself from participating in that Fund, then the 1954 Act provides (§34) that the compensation payable on compulsory purchase not merely shall be existing use value of the land at the date of the notice to treat but shall also include the benefit of certain planning permissions which have either been granted expressly, or are deemed to have been granted, for its development. These special classes of land are itemized in the Sixth Schedule to the 1954 Act.

Complex provisions are included in the 1954 Act (§36) amending the basis of compensation for severance, injurious affection, and disturbance.

C. Hardship Cases—the Case of Mr. Pilgrim

For the purpose of removing hardship special provision has been made in section 35 of the 1954 Act for an additional payment (on an *ex gratia* basis and not demandable as of right) where on a compulsory purchase of land it is found that for one reason or another no claim on the 1947 Act's £300,000,000 Fund was made. Section 35 was added at a late stage by the House of Lords after the Act had

passed through the House of Commons, the latter Chamber subsequently confirming the Lords' additions. The section, known as the "Pilgrim Section," derives from the case of one Mr. Pilgrim who, having paid £500 in the open market in 1950 for a plot of land adjoining his house, later had it compulsorily acquired from him by a local authority acting under the 1947 Act for the sum of £65 (its existing use value), *no claim on the 1947 Act's £300,000,000 Fund for loss of development value ever having been made.* In these circumstances Mr. Pilgrim committed suicide, a fact very fully reported and pointedly commented upon in both technical and popular press.

Whether any such additional payment as is allowed by section 35 will be made will depend on the merits of each case. It will not be paid in any case unless it can be shown that a claim on the £300,000,000 Fund would have been established if it had been made. If this can be shown, then an additional payment calculated by reference to the unexpended balance of established development value of the land, *must* be paid *unless,* in the opinion of the "appropriate authority" (§35(3)), it is not "just and reasonable" that it should be paid, either in whole or in part (§35(2) proviso).

D. Effect of Payment

The paying of the whole or part of any unexpended balance of established development value on the purchase of land has the effect of extinguishing or, as the case may be, reducing the amount of that balance (§37).

Any public authority interested in knowing whether in fact there is any unexpended balance of established development value for the time being attached to land which it is proposing to purchase may on demand ascertain information about this from the Central Land Board (§49).

E. The Two Rates of Compensation—Consequential Protection for Prospective Private Purchasers

One of the difficulties arising from the two rates of compensation (the private rate and the public rate) is that a private person may buy a plot of land at full market value and before he has had time to develop the land (thereby raising its existing use value) find his newly bought land compulsorily acquired from him at a rate which, excluding all post-1947 development value, is less than he has paid for it. It is the object of section 33 of the 1954 Act to meet this situation.

Section 33 provides that a private prospective purchaser of land can, by application in writing, require the local county borough council, non-county borough council, urban district council or rural district council to serve on him a notice within twenty-eight days stating whether or not—

(a) the council propose to acquire the land (compulsorily or otherwise) within the next five years, or

(b) the council have been notified by a public authority possessing compulsory purchase powers that that authority proposes so to acquire the land within the next five years.

If the notice which the local council give discloses a negative answer on each of the foregoing points, then, provided the prospective purchaser completes, or enters into a *bona fide* contract for, the purchase of the land, and gives notice of the completion or of the contract to the local council within three months of receiving the local council's notice with the negative answers, he will receive some protection if, before the end of five years from the service upon him of the local council's notice, his land is compulsorily acquired.

The protection which is given in a case in which all the foregoing requirements are satisfied is that if the land is acquired compulsorily within the five-year period, there will have to be paid for it not the current existing use value of the land plus its 1947 development value, but the value of the land with the benefit attached to it of any planning permission already granted and still in force at the time of the service of the local council's protection notice with the negative answers.

For any notice which it serves the local council may charge a fee of 5s. (§33(4)), and if they fail to serve a notice within the statutory twenty-eight days they are deemed to have served a notice with negative answers (§33(3)).

XII

MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS—PART VI OF THE 1954 ACT

The 1954 Act contains in Part VI some important provisions of a miscellaneous nature.

Information as to the amount of the original unexpended balance of established development value of any land can be obtained on application to the Central Land Board for a fee of 5s., or, in a case where the giving of this information requires the making of a new apportionment, for a fee of 15s. (§48), and public authorities can be given precise information as to the amount of any unexpended balance for the time being attaching to any land (*ibid.*)

A new system of exchequer grants to local authorities is provided by the enacting in section 50 of the 1954 Act of a brand new section 93 for the 1947 Act. Under the new system there will be a general grant at the maximum rate of 50 per cent of the costs, excess or expenditure in relation to which the grant is calculated. In the case, however, of grant paid in connection with the acquisition of land as a public open space, a last-minute amendment of the Act has provided that the maximum rate of grant may, at the discretion of the Minister, exceed 50 per cent, but not 75 per cent.

It is important to note that payments already made or yet to be made, in relation to war-damaged land under section 59 of the 1947 Act and the Planning Payments (War Damage) Scheme, 1949 (No. 2243), are, if over £20 and no development charge has been incurred, to be registered against the land as a local land charge and will be repayable with the interest paid thereon, on the subsequent carrying out of any kind of "new development" (§57). This is clearly a point which purchasers of land for development must now bear in mind.

Section 59 of the new Act contains important provisions relating to planning

permission for industrial development and affects section 14(4) of the 1947 Act. Section 63 of the new Act provides for the ultimate dissolution of the Central Land Board and section 70 removes certain doubts relating to the right to receive confirmation by the Minister of a purchase notice served under section 19 of the 1947 Act by making it clear that in considering whether land has become incapable of reasonably beneficial use, attention must be paid to the land in its existing state and not to any potential development value which it may happen to have.

XIII

COMMENT

The 1954 Act has been termed a compromise attempt (because there is no perfect solution) at dealing with the compensation-betterment problem of land planning. It is a compromise because, on the one hand, it makes no further attempt at the direct or ad hoc collection of betterment (such attempts having failed under the 1932 Act), while on the other hand, it provides for the payment of limited compensation on the imposition of planning restrictions on development.

There can be no doubt that it is the lack of any further attempt at the ad hoc collection of betterment on the one hand, and the "pegging back" of development values in land to 1947 on the other, which form at once the main basis and the controversial features of the 1954 Act.

A. As to the Abandonment of Betterment

So far as betterment is concerned it may be useful to draw attention to the great cleavage of development values which occurred in 1947 as between development values accruing before January 7, 1947 (the date of the introduction as a Bill of the 1947 Act), and development values accruing on or after that date. The midnight of January 6-7, 1947—the moment of Betterment's Great Divide—was a moment fraught with import as much for the 1954 Act as it was for the 1947 Act.

The new Act does not, as has been suggested, throw betterment completely to the winds because it has provided that the community, whenever it wants them, shall be in a position to acquire for nothing all the increase in value (*i.e.*, betterment) accruing to land since January, 1947, by reason of the fact that the community never has to pay for any such betterment whenever—

(1) a planning decision is given which prevents an owner realizing some or all of such betterment, or

(2) land is compulsorily acquired for public improvements as, for example, roads, schools, houses, open spaces, and so forth.

Indeed, the only development values in land which, under the new Act, are lost to the community are those which accrued before 1947, and even these are not completely lost because they will never have to be paid for in the case of any land on which a person failed or forgot to establish a claim on the 1947 Act's £300,000,000 Fund. There is one exception to this and that is the *ex gratia* payment to be paid

(but only in certain instances) under section 35 of the new Act in connection with the compulsory purchase of land.

It may be admitted that under the 1954 Act while money flows out of central funds by way of limited compensation in certain cases, nothing is to flow into central funds by way of betterment. In view of this, some have argued that the new Act merely restores the compensation betterment problem as it existed under the Town & Country Planning Act, 1932. This, however, is not correct, because it is to be remembered that betterment is of two kinds and the only kind which the 1947 Act sought to collect was the kind created by the developer himself in carrying out development of his land. The *full* amount of this increase in value of land, caused by the sweat of the developer's own brow, was "creamed off" in the form of a 100 per cent development charge, no allowance being made for the risks and hazards borne by the developer in carrying out his scheme of development.

A very different, and much more controversial, type of betterment is embodied in the rise in the existing-use value of land caused by neighboring public improvements or by scarcities or by other entirely extraneous matters not associated in any way with the efforts of the landowner himself. This type of betterment was left untouched by the 1947 Act which made no attempt to collect it. Indeed, it may be said that one of the prime troubles of the 1947 Act stemmed from the psychological blunder which it made of attempting to collect that particular kind of betterment which, above all other kinds, should have been left to the developer himself.

Accordingly, in comparing the new Act in so far as it touches (or rather fails to touch) betterment, with previous efforts at collecting betterment, care should be taken to draw a fair comparison. In other words, if under the 1954 Act that type of betterment which is embodied in a rise in the existing-use value of lands is thrown away, then it is to be remembered that the 1947 Act also threw it away.

Moreover, the powers of compulsory purchase by public bodies have never been wider than they are today and the White Paper of 1952 threatens (in case of need) to make them wider still. In view of all this, and of the further fact that compulsory purchase of land is to take place on terms which ignore all development values accruing on or after January 7, 1947, the question may be asked—is the case for the ad hoc recovery of betterment anything like the case it was? Those who are still arguing this case should remember three things: first, that there was a good deal of betterment which the 1947 Act itself abandoned as hopeless to recover; second, that the 1954 Act involves the pegging-back of development values to what they were in January, 1947 (a pegging-back which will become progressively drastic in effect as the development value of, for example, undeveloped land continues to rise after 1947); and third, that experience under the 1932 Act as well as the 1947 Act has shown that betterment is, in any event, and on any showing, easier to claim than to collect.

B. As to the Payment of Limited Compensation

But if the new Act abandons all further attempt at the ad hoc collection of betterment, it has, on the other hand, severely limited the amount of compensation payable for planning restrictions.

Under the 1932 Act compensation for planning restrictions was payable by local planning authorities out of local rates and the total amount potentially payable on the whole country was entirely at large. Many local planning authorities (especially the poor ones) were unable to give planning decisions which were completely uninfluenced by the fear of having to face compensation out of local rates.

The 1947 Act removed all liability for compensation from local planning authorities by providing a sum of £300,000,000 to be used in a once-for-all settlement for the nationalization of all development values in all the land in Great Britain, after which settlement no problem of compensation could ever arise. The distribution of this sum was stopped (as has been mentioned) by the 1953 Act and the 1954 Act provides that there shall be no such once-for-all payment as was envisaged by the 1947 Act, but that compensation for planning restrictions shall (subject to many exceptions) be met (as it was, in effect, to be met under the 1947 Act), out of central funds (*i.e.*, out of national taxes and not local rates) but only *as and when* the "pinch" of planning is felt. The total figure payable by way of compensation becomes a known, finite figure because it is related to the claims made and established on the 1947 Act's £300,000,000 Fund. Thus the total *possible* amount of compensation payable under the 1954 Act is about £350,000,000 this being approximately the total of all the established claims under the 1947 Act. But the total *probable* amount of compensation payable under the 1954 Act is obviously going to be much less than £350,000,000 because it is to be remembered that no part of this total figure will ever be paid unless and until the "pinch" of planning is felt by a landowner, either by his being refused planning permission for development, or by having his land compulsorily acquired at its current existing use value. Indeed, the full amount of £350,000,000 will clearly never be paid at all and the figure which the Government have in mind as being the one likely to be paid out over an indefinite period of time is around £100,000,000, that is to say, £200,000,000 less than the 1947 Act provided should be paid in 1953.[18]

The payment of compensation if and when "the pinch" of planning is felt (for example in 1977, if that is the date on which the relevant planning restriction is imposed) by reference to development values as they existed in 1947 is a proposition which has never previously been tried. The White Paper of 1952 did not seek to suggest that this proposition was a perfect solution and the applicant who, in 1977, is refused planning permission and is then paid in money values as they existed 30 years earlier in 1947, may well find himself in agreement with the White Paper on

[18] See the remarks of Parliamentary Secretary, Ministry of Housing and Local Government: "We intend only to pay about one-third of that [£300,000,000] sum by instalments." 508 H.C. DEB. 1229 (5th ser. 1952).

the point. Nevertheless, in the absence of a perfect solution, the White Paper claimed the new arrangements, as now embodied in the 1954 Act, to be the best under all the circumstances.

So far as compensation and betterment are concerned, it would, on reflection, appear arguable that the 1954 Act is not so much in danger of becoming burdensome to the community by reason of the fact that it fails to collect betterment, as it is of becoming burdensome to the private individual owing to its rigorous exclusion of compensation for planning restrictions which preclude a man from realizing the development value of his land. In short, under the 1954 Act the position of the man who gets planning permission is rosy enough, but things are not by any means so good for the man who is refused permission. The object of the financial provisions of the 1947 Act was to even things up as between the lucky man who got planning permission and the unlucky man who failed to get it and it must be admitted that the provisions of the new Act are by no means calculated to achieve this end. On the contrary, the new Act tends to pinpoint the bad luck of the man who, in the public interest, is refused planning permission as against him who is fortunate enough to get it. The danger here is that planning authorities (being human after all) may be sorely tempted into giving planning decisions on a sympathetic basis rather than on a dispassionate assessment of what good planning, in the circumstances, requires.

C. Conclusion

The position, summed up, appears to be this. Betterment collection is, and always has been, fraught with difficulties. The last attempt at this collection (through the medium of development charges) appeared to be hated generally and was abandoned, to the delight, or so it seemed, of everyone. But this having occurred, it is difficult to see how the new Act could fail to peg back development values to 1947, thereby relieving the community from having to pay for post-1947 development values whenever it wanted to plan land or to acquire land compulsorily, in the public interest. Those who are prepared to accept, on the one hand, the abandonment of betterment through the abolition of development charges and yet continue to press, on the other hand, for full compensation for all planning restrictions, should remember that what they are really asking for is the putting back of the planning clock, not to 1947 and not even to 1932, but to something much earlier than that. They are, in fact, completely shutting their eyes to the fact that, as the Uthwatt Committee reported, there *does* exist a compensation-betterment problem indissolubly associated with land planning and that without its solution control of land use cannot be properly carried out.

The 1932 Act never properly faced the problem. The 1947 Act faced it dispassionately and logically and made a valiant though abortive attempt to solve it. The 1954 Act steers a middle course between the 1932 Act and the 1947 Act. Less logical than the 1947 Act, it nevertheless avoids the theoretical excesses of the earlier Act

and although by no means perfect from every point of view (it is admittedly a compromise), it does not necessarily follow that it will not work in practice or that it is bound to be swept away after a short period of years. Indeed, whenever prophecies are heard of the early demise of the 1954 Act, it would appear permissible to ask this question—if the principles of the 1932 Act did not make a genuine effort to solve the compensation-betterment problem of land planning, and if the principles of the 1947 Act valiantly tried to do so but failed, and if the new principles embodied in the 1954 Act are also to fail, what then are the principles on which this vexed question can be solved?

THE DIMINISHING FEE

HARRY M. CROSS*

In Comment *e* of Section 5 of the *Restatement of Property* (Vol. I, 1936), "complete property" is described as the totality of rights, privileges, powers, and immunities that a person may have with regard to a particular tract of land. Thus, if by law no person can erect on his land a building more than five stories in height, complete property is correspondingly limited. In an article, "Caveat Emptor,"[1] the late Harold Potter examines the changes in English land law made by certain statutes[2] of that country. The essence of Mr. Potter's belief is that as a result of those acts, fee ownership in land had been changed to an ownership having fee simple duration, but in specified or limited uses. There is no doubt that in America the theory of absolute ownership is not the prevailing one,[3] and dominion over use, development, misuse or other treatment of land by an owner in fee simple has materially decreased in recent decades. Whether the position which may be currently identified even closely approaches the result Mr. Potter asserts to have been reached in England, or whether the position is merely specification of complete property in the *Restatement* sense is not entirely clear. On the one hand, zoning restrictions such as the *Restatement* mentions do narrow the scope of what the fee simple owner can do with his land in a manner equally applicable to all land owners similarly situated. On the other hand, there are limitations on what an owner may do with his land which become effective only after he has moved within the area of limitation. As to the former, it may be properly said that the fee simple ownership is narrowed in fashion tending toward a position Mr. Potter emphasized, but in the other situation, it at least may be said that until the problem arose, there had not yet been a delineation of the extent of "complete property," and therefore it cannot be said that the fee simple ownership has been diminished in scope. It is the purpose of this article to explore briefly some of the areas, outside of orthodox metropolitan zoning or planning, in which there have been adjustments in the scope of fee simple ownership in the sense of absolute dominion over land. Where the law has developed to the point of some precision in the measurement of the rights of the fee owner, there may be some certainty in an assertion that the fee simple right has or has not been narrowed. But if the rules have not previously been tested by way of conflict between com-

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[1] *Caveat Emptor, or Conveyancing Under the Planning Act*, 13 CONVEY. (N.S.) 36 (1948).

[2] Agriculture Act, 1947, 10 & 11 GEO. 6, c. 48; Agricultural Holdings Act, 1948, 11 & 12 GEO. 6, c. 63; Town & Country Planning Act, 1947, 10 & 11 GEO. 6, c. 51.

[3] See MacChesney, *Changing Concepts of Property*, 24 A.B.A.J. 70 (1938).

peting interests, there is no way to be sure that the particular determination illustrates the *Restatement* definition or Mr. Potter's identification. In this country, as in England, the ordinary area of information usable for delineation of the scope of fee simple ownership has expanded beyond controversies between private individuals, to include, in addition, conflicts in which there is a community, general, or public interest.

In the urban areas it probably is beyond argument that the origin of limitations on an owner's freedom to do as he might wish with his land is in the proximity of other owners or occupants of land who would be affected by the acts of the particular owner.[4] When land use conflicts arise in areas not particularly crowded by human occupation, the problem shifts more toward the physical characteristics of land use, in a conservation sense, or toward a problem of public revenue or expense.[5] In both of these areas in so far as the current owner is limited by extraneous forces, a factor of general welfare for the public at large is involved. Thus all conservation programs look to the ultimate benefit to the community either in the short range or in the long range. Conversations with persons active in the fields commonly labeled conservation reveal their firm conviction that sound conservation practices frequently soon, if not immediately, yield greater returns than unsound practices which a particular owner might desire to follow, and reveal the even firmer conviction that only by sound practices can the productivity of land be assured for the generations to come. Thus it is commonly asserted that the general welfare supports police power control of the current use of land without invasion of constitutional protections for the current owner. From this reasoning has developed the soil conservation district approach to achieve this long range goal.

All states, it is reported,[6] have adopted laws which authorize the creation of such districts. As is true with a wide variety of governmental districts, a land owner, because of the wishes of his neighbors and despite his own, may find himself within a district and thereby burdened with requirements not of his own choice. It was proposed that all conservation districts should include adequate areas of land, and also should include controls over activities of persons within the area, if necessary, against their firm wishes.[7] In many of the states there is power in soil conservation districts to adopt land use regulations, which each operator within the district must follow. Despite this authorization, apparently most conservation districts have not adopted compulsory measures, but instead have relied on voluntary cooperation aided by persuasion of the operators within the district. While there is, therefore, in many districts the power to reduce the scope of fee simple rights, there has not been the reduction which this power would permit. Rather, there has been a voluntary change of use by the owners in the exercise of the orthodox fee simple owner's choice. This

[4] The law of private nuisance illustrates this, as well as urban zoning.

[5] See Warp, *The Legal Status of Rural Zoning*, 36 ILL. L. REV. 153 (1941), or almost any discussion of rural zoning.

[6] W. ROBERT PARKS, SOIL CONSERVATION DISTRICTS IN ACTION 13 (1952).

[7] *Id.* at 147.

even has been carried to the extent that farm plans of conservation practices for the particular unit are regarded in large measure as "gentlemen's agreements," rather than contractual obligations between the farmer and the district which must be carried out.[8] Even though in a technical-legal sense compulsion to perform the contract is possible, compulsion in fact is contrary to the mores of the farm community, and there is no operative narrowing of a fee simple owner's volition as to use. On the other hand, there apparently is developing a practice which can go far toward a change in practices of individual farmers without any technical narrowing of his fee simple rights, in that mortgage lenders may condition the loan or the non-acceleration of unpaid balances on the adoption and carrying out of practices in accordance with a plan approved by a soil conservation district.[9] In this fashion, in addition to the educational features of soil conservation district programs, there may develop a common pattern of limited practical volition in land use without in fact having any narrowing of the freedom of the fee simple owner.

In the grazing districts[10] established in western states there is both direct control over what the owner may do on his land and a moving into the area of restriction in order to take advantage of certain privileges to use public land. Thus, under the Montana grazing district program, once the district is established the land owner, whether or not participating in the program of controlled use and reasonable division of grazing lands of the district, is required to make only a reasonable use of his own land in the sense of the number of head of stock which he grazes. If he participates in the grazing district program, he may use lands under the control of the grazing district, but must also make reasonable use of his own land. Under the program of the Federal Taylor Grazing Act,[11] a land owner is similarly required to make reasonable use of his own land for grazing and to have control of base property—either land which can supply grazing in certain amounts or times or water supply necessary for adequate grazing—in order to qualify to graze on the public lands. Thus under both types of grazing control programs, an owner in order to gain the benefit of use of lands he does not own, must conform to practices established for the district; and under the Montana program even though the owner does not desire to avail himself of the district controlled lands, he will none the less be limited in his use of his own lands, at least in the sense of not being allowed without penalty to overgraze them in a manner likely to cause his stock to graze beyond his boundaries in order to get adequate food supplies. The Montana pattern further narrows the field of legal action by the non-participating owner within a grazing district. Thus in the area of land use for grazing, a pattern of nar-

[8] *Id.* at 61.

[9] See Note, *Control of Land Through Contractual Provisions Designed to Prevent Waste,* [1950] WIS. L. REV. 716.

[10] On the grazing districts, see generally, 3 REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION, WATER RESOURCES LAW 364-365 (1950); Penny and Clawson, *Administration of Grazing Districts,* 29 LAND. ECON. 23 (1953); Williams, *Group Action for Range Control in the Northern Great Plains,* 13 ROCKY MT. L. REV. 199 (1941).

[11] 48 STAT. 1269 (1934), as amended, 68 STAT. 151 (1954), 43 U.S.C.A. §315 (Supp. 1954).

rowing of the fee simple owner's choice of extent of use is established. The goal of these controls is the assurance of adequate continuing supplies of forage without damage to the range land.

In the area of rural zoning[12] a different motivating factor is found. Here the depletion of the natural resource, frequently timber, created areas of land having little current economic earning capacity, and resulted in enactment of rural zoning laws designed in part to prevent occupation of lands having physical qualities suitable primarily for forestry use rather than farming use. One goal of such laws is the restoration of tax revenues from such rural lands by returning them to a use such as forestry or recreation, which has economic feasibility, without at the same time giving rise to governmental expenses greater than the area could itself support. These governmental expenses take the form of costs of roads, costs of transportation of children to schools or of the establishment of schools, and costs perhaps of a social welfare type to assist those whose endeavors are inadequate to supply a livelihood because of the type of land use. The requirement of compulsory education laws that children be educated and the requirement that roads be supplied for the community, both expanded in recent decades, undoubtedly increased enormously the expense to the community at large of unwise location of the population. Such zoning laws are authorized in many of the United States, usually in the form of authority granted to counties to adopt rural zoning ordinances, and pursuant to such authority, many counties have in fact enacted these direct control laws. Here is an area where there is clearly a reduction in the scope of the fee simple owner's choices in the use of his land.

While rural zoning has an element which can be characterized as conservation in the broader sense which frequently relates to timber use, there is a form of conservation measure recently enacted in certain states[13] which controls directly what an individual owner does with his timber in order to assure that in the future there will continue to be timber growing on lands primarily suitable for such use. This pattern is well represented by the Forestry Practices Act[14] of the State of Washington, under which the appropriate state official can control the cutting of timber on private land by the means of permits prerequisite to any harvesting of timber. Before such a permit will be granted the land owner or timber operator or both are required to agree to cut in such manner that there will be reforestation of the area, either by leaving seed trees or other means of natural reforestation, or by posting a bond to assure artificial reforestation by replanting. The constitutionality of the law was sustained in *State of Washington v. Dexter*.[15]

[12] The literature is voluminous. See, *e.g.*, Warp, *The Legal Status of Rural Zoning*, 36 ILL. L. REV. 153 (1941); Stoltenberg, *Rural Zoning in Minnesota; An Appraisal*, 30 Land Econ. 153 (1954). For extensive discussion and analysis of the particulars of enabling statutes and enacting ordinances on rural zoning, see ERLING D. SOLBERG, RURAL ZONING IN THE UNITED STATES, AGRICULTURAL INFOR. BULL. No. 59 (1952).

[13] See Note, *State Laws Limiting Private Owner's Right to Cut Timber*, [1952] WIS. L. REV. 186.

[14] WASH. REV. CODE, c. 76.08 (1951).

[15] 32 Wash. 2d 51, 201 P.2d 906 (1949), 13 A.L.R.2d 1081 (1950), Note, 25 NOTRE DAME LAW. 360 (1950).

The police power control of the land use and timber cutting operations supported in *State v. Dexter* is clearly on the basis of the general welfare for generations to come rather than a general welfare in an immediate sense.[16] Comparable problems of long range planning in the use of timber resources have led to management of public timber lands with similar goals. In this respect the authorization and direction to manage public timber lands in accordance with scientific sustained yield principles can be found not only in federal[17] but also in state laws.[18] A serious practical problem in achieving a goal of perpetual production of timber lies in the uneconomic size for sustained yield production of many tracts in public ownership. To meet this problem authorization is given for the state official to enter into agreements with the federal agencies controlling timber resources and also with private holders of timber lands to operate tracts combining the several ownerships on sustained yield principles. In order to avail himself of the opportunity for profitable timber operations and to get publicly owned timber, a private owner here must relinquish his freedom to cut as he chooses[19] and thereby move voluntarily into an area of restriction of his fee simple rights. In a somewhat similar fashion, private owners of timber lands may find themselves required to permit others to use their access roads for a reasonable price, although they may desire to prevent such use, in order to gain rights to cut publicly owned timber even though there is no organized sustained yield area. Such control practices, for instance, have been adopted in the management of the O & C Railroad grant lands in Oregon where there is a peculiarly aggravated problem of small separate timber tracts.[20] Further in the area of a right to make a use of another's land or access because of the needs of a major economic production area, the Washington Constitution and statutes[21] permit a private condemnation of easements of access for logging purposes. These are illustrations of a narrowing of fee simple rights for other private purposes without necessarily any conservation goal, but rather in order to permit a paramount industry to operate effectively.

The whole area of wasteful use of natural resources is one in which various controls have been established over the years.[22] Probably the most complete controls lie in the oil and gas areas where the problem has not only a conservation aspect, but

[16] See Note, *Constitutionality of Reforestation or Forest Conservation Legislation*, 13 A.L.R.2d 1095 (1950); Note, 25 NOTRE DAME LAW. 673 (1950).

[17] Sustained-Yield Forest Management Act, 58 STAT. 132 (1944), 16 U.S.C. §583 *et. seq.* (1946).

[18] For example, WASH. REV. CODE c. 79.52 (1951).

[19] Assuming no limitation such as Washington's Forestry Practices Act.

[20] See Ballaine, *The Revested Oregon and California Railroad Grant Plans; A Problem in Land Management*, 29 LAND ECON. 219 (1953).

[21] WASH. CONST. Art. 1, §16. WASH. REV. CODE §8.24.040 (1951). The person who avails himself of this right of condemnation is required to permit others to use his logging road at reasonable rates subject to determination by the state's Public Service Commission. This Washington constitutional provision also enables persons to condemn easements for private purposes for drains, flumes or ditches across others' land for agricultural, domestic or sanitary purposes.

[22] In addition to the references to forest practices control see, for instance, Note, 168 A.L.R. 1188 (1947); 42 ILL. B. J. 648 (1954); Williams, *Conservation and the Constitution*, 6 OKLA. L. REV. 155 (1953).

also an aspect of protection of one owner with reference to other owners. Thus the commonness of the oil pool means that any use by one has a direct and immediate effect upon the use by another. The apparentness of this effect led quickly to an increase in wasteful exploitation which similarly led quickly to various control devices. Though the history of oil and gas control is relatively short, as has been said elsewhere,[23] the rules reached a full maturity in a short period of time. In the timber-use area, as with other fixed quantity natural resources, wastefulness of one owner does not have a direct and immediate effect upon others having comparable resources.[24] Control of timber cutting, with the requirements of reforestation, is sought for the long range future primarily, rather than as equitable division of the resource and non-wasteful use which appear to be goals of the oil and gas controls.

The *quid pro quo* approach to sound land use illustrated above in the grazing district control has another illustration in the acreage limitation rules and laws in irrigation areas where, in order to be eligible for water from the irrigation project, the maximum permissible area of land owned by one person is established.[25] In the Columbia Basin Project this development has gone farther than in other projects, and not only is the area controlled as to maximum size, but change of boundaries, through the identification by the Bureau of Reclamation of "farm units," may be required to qualify a tract for water. These units are planned to be sufficient in size and productivity to support a family. Cognizance is taken of topographical problems and the boundaries of farm units are therefore other than merely sub-divisions of a rectangular government survey.[26] No owner can possess or control more than the single unit and thus the potential for fee simple ownership freedom in the irrigation project areas is greatly curtailed. It is true that on his tract the owner apparently can do what he wishes with the land. The fee owner's power prior to delivery of water is further controlled by anti-speculation restrictions on sale prices. If the land is within the district[27] it cannot be sold at more than its raw land value, and land in quantity beyond a farm unit size cannot be held in single ownership but must be sold.[27a]

[23] Williams, *supra* note 22, at 156.

[24] It is, of course, true that there may be a direct effect on others through water runoff or erosion, but probably no, or at least only small, direct effect on other owners of nearby timber.

[25] 3 REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION, WATER RESOURCES LAW 217-237 (1950).

[26] Unpublished papers on Irrigation Law and Water Rights, Washington State Bar Association Annual Meeting, Sept. 1954.

[27] Though the outer boundaries of the district may include a particular tract of land initially, the owner of land within those outer boundaries could determine whether to place his land within the district or not. Thus it is necessary to say "if the land is within the district."

[27a] Although not always directly related to use of the land by the owner, there are almost innumerable sorts of special governmental districts which compel an owner to support a program in which he may be uninterested. Thus, the creation of a district at the wish of the majority in an area may impose burdens on the unwilling owner to support through taxes such operations as provision of water supply, fire protection, drainage, diking, and hospitals. In the irrigation areas the support of costs of projects is sometimes spread beyond the land directly using the water by means of "conservancy" districts which impose tax obligations on urban lands benefited by business developed from the irrigated area. Direct control of what is done by the land owner (in addition to imposition of part of the cost of the

Contrasting with the rapid growth of the law of oil and gas is the pattern of the law with reference to the use of water. Even in the western state areas of water shortage, the rules have not achieved maturity. Much of the problem in this area stems from incompleteness of scientific knowledge with reference to the actions of ground water as it relates to stream or surface water.[28] As to the use of stream and surface water, in the western states many problems stem from controversy over applicability of riparian rights against prior appropriation concepts. Where the need for water irrigation purposes did not quickly appear, a development on the basis of common law riparian rights started.[29] But as the need for water for irrigation in the arid sections became clear, the inadequacy of riparian rights concepts to assure agricultural production likewise became clear. In these states, then, appropriation statutes were enacted, frequently piled on top of riparian rights doctrines despite the unavoidable conflict engendered thereby. Early controversies over the use of water for irrigation largely developed between individual owners. Later conflicts more commonly developed between groups of owners organized in irrigation districts against other groups of owners. But it still rather early became apparent that some over-all supervision of the whole problem was inevitable, and in the western states some sort of state agency having responsibility over the allocation of water is the common pattern.

In this area it is possible to illustrate both a decrease in established rights as the result of enactment of appropriation statutes and a mere identification of the scope of rights. The Oregon and Washington history illustrates the first. In the early law of these states riparian rights were recognized and there is some indication that the scope of the riparian right had a definiteness somewhat comparable to that in the states of the eastern seaboard.[30] But with the enactment of appropriation statutes, the problem of preservation of vested rights arose. In Oregon the statute defined the preserved right as being merely that which was presently used by a riparian owner or which would be used as a result of works presently under construction.

operation on the owner) may follow from creation of forest fire protection districts, or weed control districts requiring the owner either to control the weeds or to pay the cost of public control of the weeds, or herd law districts, by which the majority may be able to compel an owner to fence so that his herds do not run on public highways.

[28] See Wiel, *Law and Science: Their Cooperation in Groundwater Cases,* 13 So. CALIF. L. REV. 377 (1940). Though the knowledge of hydrologists on the scientific aspects of ground water and other water peculiarities undoubtedly has increased greatly in recent years, there has been a lack of common understanding by the public of the significance of these facts. There still exists in most areas of the country the difficulty of organizing available information on the actions of ground water because of lack of sufficient staff. Beyond even this, there is the continuing serious problem, revealed in discussions with the supervisor of hydraulics of the State of Washington, of inadequate staffs to get the basic information from the field.

[29] The literature is again voluminous. Recent discussions of water law development and current problems can be found in: *Symposium on American Water Rights Law,* 5 S.C.L.Q. 103 (1952); Hutchins, *History of the Conflict Between Riparian and Appropriative Rights in the Western States,* paper presented at Water Law Conference on Riparian and Appropriative Rights, University of Texas School of Law, June 1954. Extensive citation of authorities, literature, and other discussion also appears in MCDOUGAL AND HABER, PROPERTY, WEALTH, LAND c. 10 (1948).

[30] Taylor v. Welch, 6 Ore. 198 (1876); Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28 (1892). Hutchins, *supra* note 29, at 12-13.

When the constitutionality of this statute was challenged, the courts[31] found adequate power in the state under the police power for the general welfare to support this rather drastic limitation of the land owner's right. The Washington Supreme Court held that the vested rights preserved by the appropriation statute meant only rights to the extent that the riparian owner was using or in the foreseeable future might reasonably use the water rather than rights in the orthodox common law sense.[32] Thus in Washington the riparian right is cut down to a form of an appropriation right without definiteness as to volume.

In some western states the decision was reached that riparian rights were unsuited to the local conditions and hence did not exist. In these states there was an original delineation of the scope of the fee owner's right with reference to water use rather than a restriction of his right as occurred in Oregon and Washington. For instance, the Montana court in 1921 concluded that earlier statements had been mere dicta and felt at liberty to treat the problem of the existence of riparian rights as a new one. It determined that there were no riparian rights and, as a consequence, the appropriation doctrine alone applies.[33]

Water rights problems took a new turn with the beginning of the withdrawal of water from the ground by means of wells. The common statute designed to allocate stream or lake water did not provide for control of the taking of ground water.[34] Without regard to the common pool problem of ground water, the taking of ground water inevitably affects the available supply of water under control through the earlier appropriation statutes. A further problem has developed with the change in irrigation practices and the development of scientific farming principles on the use of water to supplement natural water supplies, particularly by sprinkling.[35]

The problem of use of ground water and the need for control for beneficial development of lands and waters has led to the enactment in a number of states of "ground water codes" which frequently adopt the prior appropriation theory.[36] A system of permits to appropriate has evolved comparable to that under the earlier appropriation statutes relating to stream or lake water. The problem of measurement of available supplies of ground water (disregarding the effect of withdrawal of ground water on streams or lakes) makes the certainty of the value of a withdrawal permit even more doubtful than the value of the old stream or lake water appropriation permit. As with the use of other water, it seems probable that examples exist of both the mere delineation of the extent of the owner's rights and the restriction of his rights.

[31] *In re* Hood River, 114 Ore. 112, 227 Pac. 1065 (1924); California-Oregon Power Company v. Beaver Portland Cement Company, 73 F.2d 555 (9th Cir. 1934).

[32] Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923). See also Horowitz, *Riparian and Appropriation Rights to the Use of Water in Washington*, 7 WASH. L. REV. 197 (1932).

[33] Mettler v. Ames Realty Company, 61 Mont. 152, 201 Pac. 702 (1921).

[34] See Bristor v. Cheatham, 73 Ariz. 228, 240 P.2d 185 (1952), *modified*, 75 Ariz. 227, 255 P.2d 173 (1953).

[35] Note the illustration of the activity of the Georgia farmer mentioned in Agnor, *Riparian Rights in the Southeastern States*, 5 S.C.L.Q. 141 (1952).

[36] See, *e.g.*, WASH. REV. CODE c. 90.44 (1951).

As to sprinkler irrigation relatively recently developed, whether from ground water or stream or lake water supplies, some certainty as to the extent of an owner's water right must be assured in order that the owner may safely undertake a program of investment in the equipment necessary to irrigate by sprinklers.[37] This poses for a particular owner a practical, if not a legal limitation, on what he may do with his land in agricultural areas where this method of supplementing natural water supplies is increasingly used. The enormous increase in the needs of the community for water has been noted elsewhere.[38] The water use problem as the result of these increasing needs and such methods as sprinkler irrigation has now spread throughout the whole of the United States and no longer is the unique problem of the western states. It is probably true, unfortunately, that these problems which have so long bothered the western states will not be adequately anticipated in the rest of the states,[39] but instead control or planned measures to identify the extent of the owner's right to use water will await growth of the problems to a serious point.[40]

In the use of watercourses the problem has gone through the stage of unlimited or nearly unlimited whimsical abuse by each owner having access to waters, to a point where the indefensibility and serious consequences of such chaotic practices compel governmental control. The primary example lies in the stream pollution area. It needs only mention to recall that there developed in some states the rule that a riparian owner had a right to pollute the stream as "reasonable" use, and that this private right, with the development of an area, soon conflicted with the inconsistent right of others to pollute or to have a clean stream flowing past the riparian owner's land. Control of the individual land owner in this sense sometimes developed from controversy with other individual land owners, and by this controversy came some elements of clean stream preservation, but this alone could not survive against public pollution of streams through municipal sewage discharge.[41] Such pollution, even though an invasion and therefore an interference with the scope of the land owner's right, could be continued against his wish by means of the condemnation of his right against pollution.[42] The widespread effect to others of pollution, whether privately or municipally done, became increasingly apparent as our communities became more populous, with the result that now there is a strong trend toward control both of the private owner and the municipality in such abuse of the stream,

[37] See Agnor, *supra* note 35; Editorial, *Your Stake in the New Water Laws*, Better Farming (formerly Country Gentleman), Feb. 1955, p. 148.

[38] Maloney, *The Balance of Convenience Doctrine in the Southeastern States, Particularly as Applied to Water*, 5 S.C.L.Q. 159 (1952).

[39] See Roscoe Cross, *Ground Waters in the Southeastern States*, 5 S.C.L.Q. 149, 157 (1952).

[40] Methods of control, even though complete, can operate on inconsistent theories, such as a fixing of the volume of water usable to lend stability to use, or assurance that the use will be of the highest beneficial kind. See McHendrie, *The Law of Underground Water*, 13 ROCKY MT. L. REV. 1 (1940); Comment, *An Examination of the Need for Ground Water Legislation*, 29 NEB. L. REV. 645 (1950).

[41] Agnor, *supra* note 35, at 144; Maloney, *supra* note 38, at 166; *Statutory Stream Pollution Control*, 100 U. OF PA. L. REV. 225 (1951); Jacobson, *Stream Pollution and Special Interests*, 8 WIS. L. REV. 99 (1933); 26 MISS. L. J. 106 (1954).

[42] For example, Snavely v. City of Goldendale, 10 Wash.2d 453, 117 Pac.2d 221 (1941), Note, 40 MICH. L. REV. 750 (1942).

taking the form of pollution control laws with a state agency to compel adoption of anti-pollution practices.[43] So here, too, the scope of the fee owner's freedom has changed materially under the pressure of effects upon others in the community.

There is an additional developing problem of stream and lake use for recreational and sport purposes resulting from pressures of the increased population. Controversy has arisen between land owners and sport fishermen, for instance. This controversy thus far appears to have been resolved in favor of the land owner if the stream is characterized as non-navigable, but in favor of the fisherman if the stream is characterized as navigable.[44] This test may resolve the problem with reference to streams for some time to come, but it is unlikely to resolve the problem with reference to such use of lakes. In Washington, the result has been the suggestion that there be introduced in the 1955 Legislature a bill to permit the use of any water in the state for such purposes, if access can be had without trespass upon private land.[45] If enacted and held constitutional, certainly such a law will make a major change in the rights of the owners of beds of non-navigable lakes.

The conflict of modern conditions and needs with the desires of an owner in using his land is also presented in the development of air travel and the construction of airports. Clearing the glide path area raises difficult problems of the vertical extent of the area of ownership of the nearby land proprietor. Here it may be that a definition of the extent of his right is being evolved rather than a direct limitation of his right. The case of *United States v. Causby*[46] makes it clear that the vertical extension of the area owned by the surface owner can reach into the zone necessary for approach or take off from airports. On the other hand, it appears to be beyond argument that ordinary flight at safe flight heights is not an interference with the surface owner's ownership rights however bothersome they may be to his peace of mind or rest. The attempt to minimize the expense of airport operation, particularly with reference to approach and take off zones, has been made by the use of zoning areas around airports to prohibit the erection of structures of such a height as to interfere with normal use of the airport. Such direct control of the owner's use of his land differs only in kind from the control by any other zoning and its propriety is to be tested in terms of reasonableness of the exercise of the police power.[47] If necessary, pursuant to statutory authority, the involuntary relinquishment of this

[43] See, for example, WASH. REV. CODE c. 90.48 (1951); Note, *Statutory Stream Pollution Control*, 100 U. OF PA. L. REV. 225 (1951); and the discussion in Chapter 15 of WILLIAM F. SCHULZ, JR., CONSERVATION LAW AND ADMINISTRATION—A CASE STUDY OF LAW AND RESOURCE USE IN PENNSYLVANIA (1953).

[44] *Compare* Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954), *and* Burnquist v. Bollenbach, 63 N.W.2d 278 (Minn. 1954), Note, 38 MINN. L. REV. 685 (1954). The distinction between navigability which prevents private ownership of the bed of a body of water and navigability which permits such recreational use is noted in the *Elder* case. It is not unique to Missouri. *Cf.* State *ex. rel.* Davis v. Superior Court, 84 Wash. 252, 146 Pac. 609 (1915) (non-navigable as to ownership, but navigable for transportation of logs).

[45] Interview with Assistant Attorney General of the State of Washington assigned to the State Game Department.

[46] 328 U.S. 256 (1946).

[47] The problems are discussed generally in E. C. YOKLEY, ZONING LAW AND PRACTICE c. 16 (2d ed. 1953); Young, *Airport Zoning*, [1954] ILL. LAW FORUM 261.

area of his ownership can be compelled through condemnation under state or federal statutes.[48] This, too, is no more than the limitation of an owner's freedom in connection with other public needs.

But in the condemnation area generally, a change of view as to the necessary public relationship to the right taken illustrates a narrowing of the freedom from interference (albeit paid-for interference) with the land owner's complete dominion of his land: that is, the change of concept so that the power of eminent domain can be used for public *purposes,*[49] as distinct from public *use,* greatly increases the number of things which can be accomplished by the organized public as compared with the result when exercise of the power was limited to taking for direct use of a governmental agency. Thus all redevelopment or public housing and comparable acquisitions, which either primarily benefit particular individuals or by which the areas acquired are turned over for development to private enterprise, represent a narrowing of the fee owner's absolute dominion free of interference not only by private persons but also by the government itself.

The freedom enjoyed by owners to develop their land without control by others which existed before population became so great has disappeared through a variety of devices. The most sweeping restrictions may well be those of the zoning controls, but it is also recognized that there have long been controls of a police power nature as regards health and fire protection, as well as controls embodied in the electrical, plumbing, and building codes of municipal ordinances. While these controls are not technically encumbrances upon the title of the owner,[50] they do seriously limit his use of the premises. Such controls of ordinances are not secret, but they are frequently not widely known, with a result, common no doubt in many communities in addition to Seattle, that purchasers of properties who anticipate making a particular use of their premises learn the use cannot lawfully be made, and hence discover their investment is unfortunate.[51] A common illustration of this problem is when persons invest their small savings in large, old, single-family homes anticipating change to a multi-family use, only to discover that zoning restrictions prevent such use, or that building code restrictions require major expenses to fit the structure for an existing multi-family use.

One of the more dramatic illustrations of what has been here characterized as moving into the area of restrictions appears in the case of *Marsh v. Alabama*[52] in which the Supreme Court held in effect that the use of private property (a company-owned town) in a fashion that gave it the appearance of a general business area of a municipality resulted in the loss of control over entrance upon the area.

In the area of the law of fixtures, modern conditions may have led to change

[48] In the sense that easements in the air space may be condemned. 54 STAT. 1235 (1940), 62 STAT. 1216 (1948), 49 U.S.C. 452(c) (Supp. 1952); WASH. REV. CODE 14.08.050 (1951).

[49] McDougal and Mueller, *Public Purpose in Public Housing; An Anachronism Reburied,* 52 YALE LAW J. 42 (1942).

[50] By the usual rule: PATTON ON TITLES §350 (1938).

[51] Letter to author from Superintendent of Buildings, Seattle, Washington.

[52] 326 U.S. 501 (1946).

in the rights of the land owner. It would appear desirable that there be a general extension of a concept of "agricultural" fixtures comparable to the concept of "trade" fixtures, to assist farm tenants in efficient use of the land. This is the rule in some jurisdictions, though not everywhere.[53] Further, the modern development of prefabricated structures poses interesting problems of analogy to trade machines as distinct from trade buildings under the fixtures rules. All of these things mean change from the orthodox position held by the land owner.

The development of modern highways has posed problems for the owners of land fronting on such traffic arteries. The most obvious ones affect the nature of the easements the land owner has with reference to the highway, but there are also problems as to the nature of the highway right itself, *i.e.*, who owns the fee of the highway area? A name frequently applied to new major highways is also descriptive of the problem posed by other construction, that is, the "limited access" highway.[54] Here engineers assert modern traffic conditions require that the number and methods of access to the thoroughfare be limited. The immediate and direct result is that many owners cannot get directly to the traveled way from their abutting land. It has long been stated that as an incident of ownership of land abutting on a highway there is the right of access to the highway. In these limited access highways (or freeways or throughways, as they are variously called) such direct access is eliminated. The problem in new highway construction properly appears to be one of identifying that the access right has never come into existence—not that the access right is destroyed (or purchased through condemnation). Certainly as to land abutting these new style roads, there is a substantial difference in the magnitude of rights from those existing as to land abutting on the old style roads, so that the usual statement of the abutting owner's right has lost its general applicability, even though there is no limitation of the owner's right on the new road. The problem also arises when an existing road, with its multiple access invasions, is to be converted to a limited access road. Here the law probably requires furnishing a substitute access to the thoroughfare, or the condemnation or purchase of the rights of direct access which the abutting owner formerly had. Either of these may be prohibitively expensive to the highway program and so not done, but the existence of this new concept of highway development has changed the abutting owner's practical position with reference to highway access.

Traffic problems can also impose barriers to full freedom of the abutting land owner in other ways. For instance, a problem confronting the Attorney General of the State of Washington concerns the compensability of changing the direction of traffic on the road abutting a particular land owner's tract, so that to reach the community in which he has customarily traded, he must travel approximately twice as far as formerly. On the highway fronting his property he can now only turn to

[53] See Cotton, *Regulation of Farm Landlord-Tenant Relationships*, 4 LAW AND CONTEMP. PROB. 508, 517-520 (1937); Note, 22 MINN. L. REV. 563 (1938).

[54] Illustrative discussions in the growing volume of literature: Cunnyngham, *The Limited-Access Highway From a Lawyer's Viewpoint*, 13 Mo. LAW REV. 19 (1948); Comment, *Freeways and the Rights of Abutting Owners*, 3 STAN. L. REV. 298 (1951).

the right, and to reach the community which lies to the left of his tract, he must first reach an interchange to the new half of the highway which carries all of the traffic going to the left. The land owner's contention is that he has been substantially deprived of his right of access as an abutting owner for which he must be paid. The problem of circuity of travel has long bothered the courts in problems of closing streets, highways, and other thoroughways.[55]

A direct control on what the land owner may do with his premises frequently is found in the traffic-need area as regards owners of corner lots in municipalities. The necessity that the traffic approaching on each of the intersecting streets be visible from the other requires the corner lot not to be used in such fashion as to obstruct the view. Engineering standards help to determine the area which must be so freed of obstructions. It is not uncommon to find that municipal ordinances do in fact prohibit use of corner tracts in such a fashion as to obstruct the view.[56] In less speedy times, this sort of control or limitation on the land owner's use, of course, was not only unknown but unnecessary. Modern conditions again impose pressures which limit the owner's use of his land. Safe traffic conditions on streets and highways lead to other limitations on the land owner's use, particularly those involving distractions which might interfere with safe driving. It is not uncommon thus to find ordinances controlling the erection of signs within easy vision of the thoroughfare. Whether this power to control can be extended so far as the highway traffic engineers might desire may be doubtful, unless the authority is clearly granted by appropriate legislation.[57] If there is such legislation, its effectiveness in the constitutional sense would appear to depend upon its reasonableness when the need for safe traffic conditions is measured against the desirability of freedom of use by the land owner.

Much of the change in the fee owner's control with reference to his land is the result of planning to meet problems in particular areas, frequently conservation programs. It is unfortunately true that much of the limitation has come from piecemeal attack on fragments of an over-all problem, and mere casual reading of the volumes in the *Report of the President's Water Resources Policy Commission* makes crystal clear that unified attack even on the water problems has not yet been made. Undoubtedly it is true that as Mr. MacChesney said in 1938: "Private ownership has by no means disappeared. It has, however, undergone considerable change."[58] The change does not warrant the use of the title Mr. Potter felt appropriate for one of his articles, "The Twilight of Landowning,"[59] although it may justify the title, "The Diminishing Fee."

[55] Note, 29 IOWA. L. REV. 643 (1944); Comment, 18 U. OF SO. CALIF. L. REV. 42 (1944); 32 CALIF. L. REV. 95 (1944).

[56] See, UNIVERSITY OF WASHINGTON, MUNICIPAL REGULATION OF TRAFFIC VIEW OBSTRUCTIONS, REPORT No. 122 (Bureau of Governmental Research and Services, 1953).

[57] *Cf.* Ellis v. Ohio Turnpike Commission, 126 OHIO ST. 86, 120 N.E.2d 719 (1954).

[58] *Changing Concepts of Property*, 24 A.B.A.J. 70, 73 (1938).

[59] 12 CONVEY. (N.S.) 3 (1947).

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